In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 92

MABEL BLACK and T. Y. WULFF, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members,

Petitioners,

vs.

CUTTER LABORATORIES, a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

OPENING BRIEF OF PETITIONERS.

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OPINIONS BELOW.

The Award of Arbitrators is reported in 15 L.A. 431 and is printed in R. 5-32. The opinion of the Superior Court is reported in 16 L.A. 208, and is printed in R.

75-77. The opinion of the District Court of Appeal, printed in the Appendix to the Petition for a Writ of Certiorari, page 54, is reported in 122 A.C.A. 956, 266 Pac. 2d 92. The majority and dissenting opinions of the Supreme Court of California, printed in R. 469, 490, are reported in 43 Cal. 2d 788, 278 Pac. 2d 905.

JURISDICTION.

The judgment of the California Supreme Court (R. 497) was entered on January 18, 1955. Rehearing was denied on February 16, 1955, and remittitur issued on February 18, 1955 (R. 523). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). This Court granted certiorari on October 10, 1955.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of the United States Constitution involved are Article I, Sections 9 and 10 (obligation of contract and bill of attainder), Article VI (federal supremacy), and Amendment XIV (due process and equal protection). They are printed in the Appendix hereto.

The federal statutory provisions involved are the Internal Security Act of 1950, 50 U.S.C. Section 781, subsections 1, 2, 9, 15, and Section 784 (a) and (b); the Communist Control Act of 1954, 50 U.S.C.A. Section 841; and the Labor-Management Relations Act, 29 U.S.C. Sections 151, 157, 158(a)(1) and (3). They are printed in the Appendix.

California statutory provisions involved are Sections 1027.5 and 1028 of the California Government Code and Sections 11400 and 11401 of the California Penal Code. They are printed in the Appendix.

QUESTIONS PRESENTED.

A Board of Arbitrators, acting under a submission contained in a valid collective bargaining agreement, found that a clerk-typist employed by a manufacturer of pharmaceutical and biological products, some of which are purchased by the armed services, had been discharged in violation of the agreement because of her union position and activities, and *not* because the employer believed her to be a Communist, a belief which the Board found had been entertained by the employer for more than two years, resulting in waiver of grounds for discharge based on such belief. The arbitrators ordered the employee reinstated in her former job. The court below vacated the arbitration award on the ground that public policy as expressed in certain federal and state statutes enacted after the making of the collective bargaining agreement, conclusively presumes all Communists to be dedicated to sabotage, force, violence and the like, and prohibits the employment in such an industry of a person found to have been a Communist. There had been no proof or finding in the arbitration proceeding that Communists generally or the employee involved had any such propensity. The questions presented are:

(1) Whether the decision below, by denying to petitioners the right to enforce a contract for employment in,

and to one of petitioners' fellow union members the right to engage in, one of the ordinary vocations of life, constitutes State action depriving petitioners of liberty and property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution.

(2) Whether the decision below constitutes State action depriving petitioners of liberty and property without due process of law, contrary to the Fourteenth Amendment, by virtue of the facts that the court below took judicial notice of the doctrines and practices of the Communist Party, a disputed matter, applied a conclusive presumption of sabotage propensity on the part of the dismissed employee, and failed to give petitioners an opportunity to be heard and to present evidence on these matters.

(3) Whether the decision below, by reason of the fact that without evidence it classifies all Communists, without exception, as dedicated to sabotage and the overthrow of the government by force and violence, constitutes State action denying to petitioners the equal protection of the laws, contrary to the Fourteenth Amendment to the United States Constitution.

(4) Whether the decision below, by construing certain recently enacted federal and State statutes as establishing a public policy which deprives petitioners of their right to enforce a previously valid and enforceable contract, entered into before the enactment of those statutes, makes of those statutes, as construed and applied, a law impairing the obligation of contracts, in violation of Article I, Section 10 of the United States Constitution.

(5) Whether the decision below, by giving effect to the Internal Security Act of 1950, the Communist Control Act of 1954 and certain State laws as legislative adjudications that the employee in question is guilty of criminal activities concerning which she has had no judicial trial, makes of those statutes Bills of Attainder within the meaning of Article I, Sections 9 and 10 of the United States Constitution.

(6) Whether the decision below violates the supremacy clause of the United States Constitution (Article VI) by

(a) Undertaking to regulate the employment rights of Communists in private industry, a field which Congress preempted and fully occupied in the Internal Security Act of 1950; and

(b) Establishing a rule of law which permits an employer at a critical moment in labor-management relations, to discharge the president of a union on the ground that she is a Communist, where the real purpose of the discharge is to weaken or destroy the union's bargaining effectiveness, and the stated ground of discharge is merely a pretext.

STATEMENT.

1. INTRODUCTORY.

Petitioners, appearing as representatives of a labor union, seek review of a decision of the Supreme Court of California (R. 469) which held unenforceable an arbitration award (R. 5) directing respondent to reinstate in respondent's employ one of petitioners' fellow union

members whom respondent had discharged. The proceeding in the State courts had been instituted by Petitioners to confirm the said award (R. 2). The decision below reversed two successive lower court decisions which had affirmed the award (R. 81; Appendix to Petition for Certiorari, p. 54).

The facts presented in this Statement are based in all essential respects on the detailed findings of fact made by the Board of Arbitration (R. 5-32). Our reliance on the findings of the Arbitrators is justified by the fact that all of the tribunals below, including the California Supreme Court, accepted such findings as conclusive and non-reviewable (R. 76, 490-491; Appendix to Petition for Certiorari, pp. 56-61). We assume that this Court likewise will not review the merits of the factual findings of the Arbitrators.[1] However, the majority of the court below in vacating the Arbitrators' award apparently treated certain language of the Arbitrators as a "finding" that the discharged employee was personally dedicated to "sabotage, force, violence and the like" (R. 478-479, 480, 485, 488), a conclusion which distorts the actual holding of the Arbitrators and which is entirely without evidentiary support. Because the respondents' argument is based almost exclusively upon Mrs. Walker's alleged personal propensity to sabotage, etc.; and because the ques-

[1]Under California law the merits of an arbitration award, either on questions of fact or of law, are not subject to review. Section 1288, Cal. Code. Civ. Proc.; *Utah Construction Co. v. Western Pacific R.*, 174 Cal. 156; *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.*, 29 Cal. 2d 228; *Crofoot v. Blair Holdings Corp.*, 119 Cal. App. 2d 156; Kagel, *Labor and Commercial Arbitration under the California Arbitration Statute*, 38 Cal. Law Review 799 (1950).

tion whether the record supports such a conclusion is crucial to the constitutional issues presented, we are obliged to bring to this Court's attention some of the pertinent underlying record facts, which we shall do at appropriate places below.

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2. THE PARTIES; THEIR COLLECTIVE BARGAINING AGREEMENT.

Petitioners represent a labor organization (together with its officers and members), hereinafter sometimes called the Union, which at all times material hereto was the collective bargaining representative of respondent's employees at respondent's plant in Berkeley, California (R. 11-12). Respondent, hereinafter sometimes referred to as the Company or as Cutter, is a corporation engaged at Berkeley and elsewhere in the production of biological and pharmaceutical products (R. 10). On October 6, 1949 the Company discharged Doris Walker, then the president of the Union, on the asserted grounds that she had falsified her employment application some three years earlier and that she was a Communist (R. 7-10). The collective bargaining agreement in force at the time of Mrs. Walker's discharge contained a pledge by the employer not to interfere with, restrain or coerce employees because of membership or lawful activity in the Union; a guarantee against discharge except for "just cause"; and provisions for submission to arbitration of grievances arising under the agreement, the decision of the arbitrator to be "final and binding upon the parties" (R. 6-7; Board Ex. No. 1, introd. at R. 8, not printed).

3. THE ARBITRATION PROCEEDING; THE FINDINGS AND AWARD IN FAVOR OF THE UNION AND THE DISCHARGED EMPLOYEE, AND THE EVIDENCE IN SUPPORT THEREOF.

Following Mrs. Walker's discharge the Union invoked the grievance procedure (R. 15) and eventually the dispute was submitted to a board of three arbitrators, one chosen by each of the disputants, the third a neutral arbitrator selected from a panel named by the American Arbitration Association (R. 3-4, 33). The Board of Arbitration held extensive hearings (July 26, 27, 28, August 2, 3, 4, 1950) (R. 89-464).

The positions of the parties in the arbitration proceeding were, in essence: For the Company, that Mrs. Walker was discharged for "just cause" because (1) she was a Communist and hence a threat to the physical security of the plant, and (2) she had falsified her original employment application to conceal her true past and connections (R. 26-27); for the Union, that the discharge violated the collective bargaining agreement in that (1) the Company's charges were stale and were a pretext for the Company's anti-union motivations in the case, since the Company had been in possession for more than two years of the essential facts on which its asserted belief in the said charges was based, (2) that the true reason for the discharge was Mrs. Walker's legitimate union activities and especially her activities, as President of the Union local, in a bitterly fought wage dispute at the climax of which her dismissal occurred, and (3) that Communist Party membership was not "just cause" for discharge (R. 24-26). The award of the Board of Arbitration, dated September 16, 1950, was that Mrs. Walker's discharge violated the collective bargaining agreement

and that she was entitled to reinstatement (R. 32). The award rested on detailed findings by the Board (R. 5-32) which, together with supporting testimony to which we shall in part refer, established the following facts:

a. **The circumstances at the time of the discharge of Mrs. Walker: the then pending acrimonious wage dispute; Mrs. Walker's prominent role in the wage negotiations as President of the Union local; the Company's sudden revival of its long dormant charges against Mrs. Walker of Communist Party membership and falsifications in her original employment application as grounds for her abrupt dismissal at a critical moment in the wage negotiations.**

The Board of Arbitration found that the circumstances at the time of Mrs. Walker's dismissal (October 6, 1949 (R. 7)) were as follows:

In the Spring of 1949 Mrs. Walker had been elected President of the Union local which was the collective bargaining agent at Cutter's Berkeley plant (R. 12). Mrs. Walker's "position of importance in the Union had progressively increased" (R. 32) in the preceding two years (R. 11-12). The local whose Presidency she assumed in 1949 not only exercised jurisdiction at Cutter, where it represented some 400 to 500 members, but it also represented about 700 to 800 additional members at other places of employment in the area (R. 11). Mrs. Walker's election to her various union offices was by democratic secret ballot (R. 107-112), as provided by the Union Constitution (R. 11).

In June 1949 the Union opened the collective bargaining agreement for a wage increase (R. 13). The negotiations, which were "stubbornly contested" (R. 31), continued into October 1949, government conciliation services

proving unavailing. The Union refrained from calling any work stoppage. On October 2, 1949 there was a radio broadcast in behalf of the Union, sponsored by it (R. 13-14). The Company was "incensed" by the broadcast as subjecting it to unfavorable publicity (R. 14). On October 5 the Union published an advertisement in local newspapers stating its view of the wage dispute and soliciting sympathetic readers to telephone one of the Cutter officials (R. 14; Union Ex. 3, introduced at R. 119, not printed). On the same day there was a grievance meeting, not related to the wage dispute; among those present were Mrs. Walker, the Company's attorney ("which was unusual at a grievance meeting"), and the Executive Vice-President of the Company, Mr. Fred A. Cutter, who "was still angry over the broadcast" and expressed himself very strongly about it (R. 14). The next day, October 6, 1949, Mrs. Walker was discharged (R. 7, 14). The discharge was effected by reading to Mrs. Walker a written statement of reasons setting forth detailed accusations of falsification in her original job application; an accusation that in October 1949 in an N.L.R.B. proceeding connected with a prior employment (before she went to work at Cutter) she had refused to answer questions about Communist membership, and charges of Communist membership (R. 7-10). Shortly after this, the Company called together the employees at the plant and read to them the aforementioned written statement. At this meeting officials of the Company made statements, either to the entire group or in private discussion, advising employees "'to get out of that left-wing Union'" and declaring that "'nothing but a left-wing Union would press for wage increases at this time'." (R. 14, 229-232.)

Four days after Mrs. Walker's discharge the Company offered the Union a two year renewal of the agreement without any wage increase (R. 14-15). The wage dispute was finally settled on November 30, 1949, with a prospective 5 cents per hour increase not to take effect until after four more months and an additional 2½ cents after ten months (R. 13). (The Union's wage demand had been for 20 cents per hour (R. 13).)

Naturally concerned that the discharge of its president at the climax of wage negotiations would adversely affect its ability to hold its membership, the Union demanded that the Company give some demonstration that it was not intending to wreck the Union. The Company (its wage position advantageously achieved) agreed to join with the Union, pending the holding of a new union-shop election, in urging eligible employees and newly hired personnel to become and remain members in good standing of the Union (R. 15, 255-260).

The Board of Arbitration summarized the circumstances of Mrs. Walker's discharge as follows (R. 31-32):

> "The discharge of a top Union official and negotiator at a passionate climax in the middle of a stubbornly contested wage negotiation, standing alone, raises an inference that the discharge is retaliatory in nature and designed to restrain, coerce or interfere with the employee because of lawful Union activity. And we find convincing circumstantial evidence to support this inference.
>
> "Two things that had lain fallow appear to have come to life when the Union opened the agreement for wage adjustment in June of 1949. The Company then put into use a new form of Application for

Employment which for the first time asked questions about religion and Communist affiliation. Then also, for the first time in over two years, the Company ordered a fresh investigation into Doris Walker's Communist affiliations.

"The discharge took place in a wave of heat over a radio broadcast and a newspaper advertisement, neither of which was complimentary. But they do not appear to have made any original contribution to the usual exchanges that go on during most wage negotiations.

"While the quality of Doris Walker's conduct and performance on the job had remained unchanged for three years, her position of importance in the Union had progressively increased. It was only a few months before the wage negotiation opened that she was elected President of the Local; and she was a member of the Union negotiating committee.

* * * * * *

"In view of all of the foregoing considerations, we find that Doris Walker was unjustly discharged, that the reasons assigned by the Company for the discharge were not the real reasons and had been waived, and that the discharge interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation."

b. The details as to the long dormancy of the Company's charges.

Mrs. Walker was originally employed at Cutter on October 10, 1946 (R. 103). In April 1947 she was elected Shop Chairman at the plant and also a member of the Executive Board of the Local (R. 11). Thereupon the

Company launched a secret investigation of Mrs. Walker and of another official of the Local (R. 12-13). In connection with this 1947 investigation, which preceded Mrs. Walker's discharge by about 2½ years, the Arbitrators found that "the investigation of Doris Walker in 1947 was specifically directed at Communist affiliation; and it is admitted by the Company that the report indicated that she was a Communist. The testimony of the three executives of the Company responsible for personnel taken together, shows an affirmative belief 6 months after she was employed that Doris Walker was a Communist. Moreover, it is admitted by the Company that the 1947 report disclosed all of the omissions and falsifications in the application for employment except [two facts]; and there is circumstantial evidence tending to show that these two facts were also known then" (R. 22).

The Company did nothing further about the 1947 disclosures until late in August 1949, which was the third month of the protracted 1949 wage dispute and when, as the Arbitrators put it in a passage previously quoted, "for the first time in over two years, the Company ordered a fresh investigation into Doris Walker's Communist affiliations" (R. 31).

c. The Company's proofs as to falsification of the employment application.

We think some discussion is necessary concerning the falsifications charged to Mrs. Walker in her original Cutter job application, despite the fact that the court below did not base its decision (R. 469) thereon or challenge the determination of the Arbitrators, confirmed by both intermediate state courts (R. 76; Appendix to Petition for

Certiorari, pp. 72-77), that the falsifications were not the real reason for the discharge and had been waived by the Company's long inaction following its discovery of the facts.[2] Mrs. Walker at the time of her application for work at Cutter was a college graduate and a member of Phi Beta Kappa, a graduate of one of the country's leading law schools, where she had been an editor of the law review (R. 15). She was admitted to the California bar in 1942 (R. 18). After admission she worked as an attorney for the Office of Price Administration and later for a leading San Francisco labor law firm (R. 15). In her application for employment at Cutter she left undisclosed all of the above educational and professional history except her college education and her Phi Beta Kappa honors (R. 17). The work for which she was applying at Cutter was office or clerical work (R. 99). She gave a false job history and a fictitious employer's name ("John Tripp", the first and middle names of her former supervisor in her government job (R. 17, 18)) to show clerical experience (R. 17). She named two persons as references, notifying both of them that she had used their names, and informing one or both of them that she had given false information to Cutter on her job application (R. 17, 157-158, 220, 223). Finally, she did not disclose that her latest employment had been as a cannery worker and as a C.I.O. organizer in canneries (R. 15, 94-95, 101).

Her falsifications were thus aimed at concealing that she was a lawyer and a person of active labor sympathies

[2]The Arbitrators' detailed findings as to the dormancy and staleness of the Company's charges appear at R. 22-24, 29-32.

and interests. The Cutter employment application contained no questions about Communist membership and she was asked no such questions before being hired (R. 17-18, 103).

d. Mrs. Walker's admission and explanation of falsifying her application.

Before the Arbitrators Mrs. Walker, fully admitting her non-disclosures and falsifications in her Cutter employment application, explained her reasons for this conduct as follows: She had undertaken the study of law with the aim of becoming a labor lawyer. She left her wartime government job (as an O.P.A. enforcement attorney) to take a job with a leading labor law firm. There, however, she found herself assigned to legal work of a routine nature which did not satisfy her longing to contribute significantly to labor's cause (R. 16, 94). Frustrated in her professional aims, she decided to abandon the law and become a worker in some field where she could acquire experience in labor union affairs and help in union work (R. 16, 94, 437-438, 440). Having no skill outside her profession, she was obliged to seek work as an unskilled laborer. The difficult economic situation at the time (1946) made it hard to find work. She tried the canneries in the San Francisco Bay area and found three jobs but lost them within a short time. Very briefly she was employed also as a C.I.O. organizer in the canneries. Determined to pursue her program and not to return to her profession, but the times being bad and unskilled jobs in industry very hard to obtain, she found herself not only frustrated in her idealistic aims but also caught in out-

right economic hardship (R. 15-16, 94-97).[3] It was at this point that she applied at Cutter. She happened to be drawn to Cutter as a job possibility because she had heard that a C.I.O. union existed there and she was interested in becoming active in such a union (R. 147-148). She believed that Cutter would never hire her for clerical work if it were apprised of her incongruous educational and professional background (R. 99, 440-441) and her labor sympathies as indicated by her employment history with the labor law firm and with the C.I.O. (R. 101-102). She had been informed by C.I.O. officials that Cutter was an anti-labor company (R. 101, 151). Because she needed the job "to eat" and wanted it in order to pursue her pro-labor aims (R. 97, 440), she decided to portray herself to Cutter in such a way as not to brand herself as unde-

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[3]The Company's Exhibit No. 5 in the Arbitration proceeding (part of the official record filed in this Court but not printed; introduced in evidence at R. 182) contained the following testimony by Mrs. Walker in an N.L.R.B. proceeding in 1948 relative to her dismissal from one of her cannery jobs:

"I went to law school originally to become a labor lawyer. That was my interest. I was interested in the trade union movement, and I thought that that would be a way to participate in it. After I had worked for a labor law firm for something over a year and a half, I was very dissatisfied with that type of work. It was not what I had thought it would be and to me it was a very unsatisfactory and even frustrating occupation. I wasn't allowed to participate in many labor law cases, because I was a very new and inexperienced lawyer, and the other type of cases that I did handle were to me very uninteresting, and I decided that I would much rather participate in the labor movement, as a worker, so I quit the law firm and decided that I would find myself a job someplace and work in an industry. So when I left, I tried to get a job in the warehouse industry in San Francisco and at that time it was shortly after the war, I was unable to find employment. In fact, I was told that there were many women unemployed, and since the field for unskilled women workers is a very narrow one, I found myself applying for a job in a cannery which was the only other industry that I could think of at that time."

sirable (R. 17, 99, 101, 440-441, 443); this entailed concealing her background as a labor lawyer and a C.I.O. organizer and worker in the cannery field. She had not discussed with anyone, "in the C.I.O. or any other organization", how she might go about "handling this problem" of her background as a labor lawyer. She did discuss with C.I.O. acquaintances the problem of her cannery background (R. 150-151). Her fictitious claim of clerical experience was not felt by her to be an injustice to her prospective employer because she was confident of her ability to do clerical or office work (R. 99-100, 442); the fictitious employer's name she used, composed of the given names of her former government superior, "was just the first name that came to my mind, and I used it" (R. 100).

e. The Company's proofs of Communist Party membership and affiliations; the absence of any proof or any interrogation aimed at establishing any propensity on Mrs. Walker's part for sabotage, force, violence or the like.

As regards the Company's second charge against Mrs. Walker—the charge of Communist membership and activity—we quote in the margin in full the Arbitrators' description of the Company's proofs.[4] The Company *in argument* at various stages of the case sought to impute to Mrs. Walker not merely Communist Party membership but also, in connection therewith, "implications of dedication to sabotage, force, violence and the like" (R. 26-27, 36, 77, 478). However, nothing in the proofs or even in

[4] "a. The records of the State Bar showed that no lawyer by the name of 'John Tripp' had ever been licensed to practice law in California; but these records did show that a man whose given names were 'John Tripp' had been admitted to practice July 7,

any of the numerous questions put to Mrs. Walker related to her "dedication" to or propensity for sabotage, etc. The proofs and interrogation related solely to Communist Party membership and affiliations as such. Mrs. Walker was not asked any questions concerning her knowledge

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1942 and it was developed otherwise that he was Doris Walker's supervisor in the O.P.A. (1942-1944). These records also showed that Doris Brin Marasse was admitted to practice December 8, 1942, and that February 28, 1947, she gave notice of change of name to Doris Brin Walker.

"b. A transcript of the record of hearings before the National Labor Relations Board September 30 and October 1, 1948 showed proceedings by discharged cannery workers, including Doris Walker, for reinstatement with back pay and also the refusal by Doris Walker to answer the question 'are you or were you ever a member of the Communist Party?';

"c. Reports of the Joint Fact-Finding Committee on Un-American Activities in California for the years 1943, 1945, 1947, 1948 and 1949 published by the California Legislature contained the following: the 1947 and 1948 Reports mentioned her supervisor in the O.P.A. and detailed his association with persons said to be 'members of the Communist Party organization'; the 1948 Report stated that 'attorneys for the Communist Party are Gladstein, Andersen, Resner, Edises, and Sawyer'; the 1949 Report notes one of the persons whom Doris Walker gave as a reference in her application for employment as an instructor in the California Labor School offering a course listed as an 'analysis of capitalist economy for advanced students' and called 'The Soviets —Fact and Myth. Everyday Life in the Soviet Union. How the Soviets look at the World'; the 1945 report stated the identity of the Communist Political Association with the Communist Party despite a change of name 'for strategic reasons May 20-23, 1944'; the 1943 Report contained a biography of Archie Brown, an admitted member of the Communist Party and a candidate for various public offices on that ticket, which mentions sponsors of his from various unions including the U.O.P.W.A.; the 1949 Report quoted the 1941 and 1944 Reports as stating that the 'People's Daily World', a newspaper, is 'the official organ of the Communist Party on the west coast.'

"d. The 'People's Daily World' contained the following information: The February 14, 1944, issue under a heading 'Meet the People' noted that Doris Marasse 'former leader of C.I.O. United Federal Workers is switching jobs . . . she will soon grace the office of outstanding Labor Attorneys Gladstein, Grossman, Margolis & Sawyer'; the May 11, 1948, issue contained a letter to the

or understanding of the program or activities of the Communist Party. She was not asked whether she, or to her knowledge or belief the Communist Party, believed in or advocated or practiced "sabotage, force, violence or the like".[5] Nor was any other evidence introduced or offer of

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editor signed 'Dobby Walker, Oakland' complaining about male chauvinism in the description of a woman lawyer; the June 14, 1944, issue listed Doris Walker's attorney as an alternate delegate to a State Committee of a 'newly formed California State organization of the Communist Political Association'; the October 31, 1946, issue noted a radio program conducted by Doris Walker's attorney on behalf of a 'citizen's Committee for Archie Brown for Governor . . . the Communist writein candidate'.

"e. A photostatic copy of an unaddressed handwritten letter dated '7/10/46' and signed 'Doris Brin' discussed the propriety of the introduction of a resolution on the maritime strike at the Cannery Workers Club by the writer and another, indicated perturbation and finally a conclusion that the introduction of 'such a resolution into my Club did not meet my tests and was wrong', and stated that 'I tried to evaluate my action, as I try to evaluate whatever I do, from the point of view of the welfare of the working class and the strengthening of the Party'.

"f. The unidentified undated documents contained biographical material about Doris Walker which stated among other things that 'Doris Brin Marasse (nickname "Dobby") was issued 1945 Communist Party membership card #40360'; that she joined the Communist Party in June 1942 and had held various positions in various clubs and sections of the Party including the 'Cannery Club'; that her present husband was a Communist Party member and organizer; and that in February, 1946 she listed the following information among other things on a Communist Party interview form: 'she gave up law practice because it was frustrating to work with people she had to work with (namely, professional people).'" (R. 18-20)

[5]The only question asked Mrs. Walker which touched even tangentially on the matter was the following: "Q. (By Mr. Johnson) And isn't it a fact that the reason why you listed those individuals and concocted this fictitious employer was because of the fact that you were a member of the Communist Party at the time and that you desired to get into the Cutter plant in order to carry on more effectively and more actively the program and the activities of the Communist Party?" (R. 440). There was an objection and a declination to answer, and a ruling that the employee would not be compelled to answer, as is more fully set forth under our next subheading. The question was not followed

proof made with respect to the program of the Communist Party, including its asserted dedication to "sabotage, force, violence or the like". Nor was any evidence introduced or offer of proof made that Mrs. Walker personally believed in, advocated or practiced any such program (R. 89-464). The complete absence of even the slightest belief on the Company's part that Mrs. Walker utilized her employment or her union position as a pretext for engaging in "Communist activity" is shown by the following testimony of the Company's Executive Vice-President (R. 415-416):

> "By Mr. Edises:
>
> Q. What evidence in the course of her employment with Cutter did you have of any activity which you regarded as "strengthening the Party" in her work at Cutter?
>
> A. (By Mr. Fred A. Cutter) We had no evidence of her "strengthening the Party" in her work at Cutter.
>
> Q. Or her activities at Cutter?
>
> A. Or her activities at Cutter . . ."

As a matter of fact, the arguments of the Company, as carefully summarized in the decision of the Board of Arbitrators (R. 26-27), indicate clearly that the Company did not deem it necessary to adduce proof that all Communists are devoted to sabotage and violence, but assumed rather that the lack of such proof could be supplied by reference to court decisions and common knowledge. Thus, after citing various decisions of this

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up or amplified by any questions concerning the alleged "program or activities of the Communist Party", nor was there any offer of proof made as to such program or activities.

and other courts, the Company declared (as paraphrased in the summary, R. 26):

> ". . . these authorities show a conviction widely held that membership in the Communist Party includes an obligation to commit acts of sabotage and destruction . . ."

f. Mrs. Walker's refusal to answer questions on the Communist issue; her offer of a stipulation on the subject; the Company's rejection of the stipulation and its retaliatory refusal to answer questions as to its own investigational sources; the Arbitrators' rulings on the parties' respective refusals.

Mrs. Walker declined, on the ground of privacy of political belief and affiliations, to answer all questions aimed at eliciting whether she had ever had any Communist affiliation.[6] The Union's attorney supported her refusals to answer on the following additional grounds (as summarized by the Arbitrators) (R. 20):

> ". . . that the political affiliations of an employee are immaterial; that, as a matter of public policy, an employer has no right to inquire into the political affiliations of an employee; that by continuing to employ her after becoming convinced within 6 months after her hiring that she was a Communist, the Company waived this issue as a ground for discharge; that this Board is not the proper tribunal to try the question whether she is a Communist;

[6]The Arbitrators found: "She was asked on cross-examination, 'Are you now or have you ever been a member of the Communist Party?'" (R. 20). And further: "Doris Walker declined to answer the question as 'an absolutely unwarranted invasion into my private beliefs'. She likewise declined to answer a long series of collateral questions relating to clubs, sections and offices in the Communist Party; persons mentioned in the Legislative Reports; the documentary evidence of the Company on the Communist issue including the letter of 7/10/46 signed 'Doris Brin'; and so on." (R. 21).

that, even if she were a Communist, this fact would not constitute just cause for discharge . . ."

Nevertheless, the attorney for the Union and Mrs. Walker offered the following admission for the record:

". . . that, without conceding that she is or was a Communist and without conceding that the Communist issue was the real motive for the discharge, it could stand admitted, for the purposes of decision, that the Company believed in good faith upon the basis of evidence that she was a Communist" (R. 20-21).

The Company declined to accept the admission (R. 20-21).

The Arbitrators overruled Mrs. Walker's objections to answering the questions, but coupled the ruling with the statement:

". . . that we would not instruct the witness to answer the question, if she did not care to do so, but that if she refused to answer we would draw all justifiable inferences from the refusal" (R. 21).

The Company thereupon took the retaliatory position that it would refuse to disclose the sources and the dates of its private investigational reports on Mrs. Walker's Communist affiliations on the ground that it was under contractual obligation to its hired investigators to preserve confidentiality.[7] The Arbitrators accorded to the Company "a corresponding immunity from cross-examination with a like caution about inferences". (R. 21)

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[7]The Company readily offered to breach this asserted contractual obligation if the Arbitrators would force Mrs. Walker to answer (R. 274-277).

In the decisional part of the Award the Arbitrators stated that, in the view which they took of the record,

> ". . . we are unable to find that the Company has been denied a fair hearing by reason of our refusal to instruct Doris Walker to answer the questions put to her touching this issue. Assuming that her answers would have been favorable to the Company's position, they would serve no more than to corroborate what we find is already established by the record; and the Company offers no convincing reason why further corroboration is necessary." (R. 29)

g. The issue of "sabotage, force, violence, etc."

As previously mentioned, there is no proof, offer of proof, or interrogation in the record concerned with connecting up Mrs. Walker with the Company's contention, adopted by the court below (R. 478-479, 480, 485, 488), that Mrs. Walker's continued employment at the plant created a sabotage danger because Communist Party membership is believed to entail "implications of dedication to sabotage, force, violence and the like" (R. 29).

The Company's manufacturing operations, the products of which are purchased both by the military and civilians (R. 10), were claimed by the Company "to be peculiarly subject to sabotage". (R. 11). The Arbitrators' findings strongly deflated the Company's professed fear of sabotage insofar as Mrs. Walker is concerned, stating, "It is conceded that the Company's operations were just as delicate and just as important when Doris Walker was employed as when she was discharged" (R. 10); and, "It is conceded that the plant was no more 'prone to sabotage' when Doris Walker was discharged than it

was when she was hired" (R. 11). As to the one type of production trouble that might be expected in connection with an intense or embittered labor dispute, namely, "destruction or damage by unannounced and sudden stoppages of the equipment", the Arbitrators, quoting a high Company official, found that such "is said to be 'routine sabotage that you discover almost overnight'" (R. 11). There was no proof or claim that anything of the kind had ever occurred at Cutter. While the Company had been subject to stringent security control during World War II by Federal authorities who exercised the power of requesting discharge of security risks, no one at Cutter was ever so discharged (R. 10-11). "Nor does it appear that since World War II the Company has been under any contract obligation to any agency of the government to discharge employees who are 'bad security risks'. Nor did any government agency recommend the discharge of Doris Walker" (R. 11).

The Arbitrators' findings as to Mrs. Walker's specific duties in her job at Cutter recited several circumstances which likewise negative any opportunity to commit sabotage in the course of her work. Her first job (October 1946 - April 1949) was as Label Clerk in the Production Planning Department, where "she worked at a desk opposite her supervisor in a room with 15 or 20 desks close together. Copy for labels for cartons and direction sheets were prepared in another department and sent to her whereupon she prepared an order to the print shop on the premises. When the printing was set, she read proof, attached an approval sheet and circulated it to 5 or 6 other people for their approval before final

printing. She was also responsible for keeping a file of all these labels and directions." (R. 16). Her next job (April 1949 until her dismissal in October 1949), as Clerk-Typist in the Purchasing Department, was even farther removed from any sabotage opportunities: "She worked at a desk in the same room with her supervisor. There she received purchase requisitions which she typed on purchase orders which were signed by the Purchasing Agent whereupon she would mail out copies to the vendor and to others in various departments of the Company. She also did general typing for the department." (R. 16).[8]

The Arbitrators also found: "It is a fair statement from this record to say that, during the entire three year period of this employment, her conduct and her performance on the job have been consistently satisfactory to the Company" (R. 17). She has never been arrested or convicted of any crime—except that she once got a ticket for speeding (R. 116-117).

The Company's utter failure to regard Mrs. Walker as a potential saboteur is eloquently shown by the fact that in her capacity as Shop Steward Mrs. Walker was permitted free and restricted access to every part of the plant (R. 12, 224-228). At no time did the Company place or seek to place any limits upon her freedom of movement (*ibid*; R. 315). It should be borne in mind that such unrestricted access was granted during the

[8]See R. 217-220 for the main testimony relative to Mrs. Walker's clerical duties at Cutter.

two and one half year period after the Company had become convinced that Mrs. Walker was a Communist.[9] Moreover, Mrs. Walker's supervisor at Cutter testified that he had never discussed with or been questioned by any of his superiors concerning any alleged Communist activities of Mrs. Walker on the job (R. 376). In sum, the entire behavior of the Company, which was most directly and intimately affected by the alleged sabotage menace presented by Mrs. Walker, and which now sounds the alarm in this Court, demonstrates a conviction, translated into practice, that the alleged "menace" was and is non-existent. So it remained until the Company, cynically, cast about for grounds upon which to base Mrs. Walker's discharge. The Board of Arbitration, in substance, so found (R. 30-32).

h. The language in the arbitration decision which is claimed to amount to a finding that Mrs. Walker is "dedicated to sabotage, force, violence and the like".

We pointed out above that the findings of the Arbitrators, and the evidence in the record, strongly negate any notion that the Arbitrators regarded Mrs. Walker as in any sense a sabotage risk. Indeed the very Award itself, ordering her reinstatement to her previous job, is the best evidence of the lack of any such belief on

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[9]The Company's trust and confidence in Mrs. Walker, as demonstrated by its willingness to permit her to have unrestricted access to the plant, may perhaps be connected with the view expressed by General Manager Beckley at the hearing on Mrs. Walker's unemployment insurance appeal. Beckley made a distinction between "good" and "bad" Communists, testifying that he let her remain employed after finding out that she was a Communist because "there might be some good ones in the world". Board Exhibit 5, page 70, introduced in evidence at folio 354 (Exhibit and folio not printed).

the Arbitrators' part. However, certain language used in the arbitration decision is erroneously treated by the Company (and apparently by the court below, R. 478-479, 480, 485, 488), as a finding that Mrs. Walker was personally dedicated to "sabotage, force, violence and the like". The language is as follows (R. 29):

> "The Company maintains that the basis for the discharge was two-fold: the omissions and falsifications in the Application for Employment and membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail.
>
> "That the Company honestly believed all of these things is admitted and the accuracy of those beliefs is established in the record as follows: by admission with respect to the omissions and falsifications in the Application for Employment; by undenied and uncontradicted evidence with respect to the membership in the Communist Party; and by uncontradicted evidence that the Company's beliefs about the full implications of Party membership were prevalently understood and shared."

That the language quoted above was intended to constitute a finding that Mrs. Walker was addicted to "sabotage, force, violence and the like" must be doubted, not only because of the entire absence of evidence on the point, but even more strongly because of the contrary *specific* finding, based on sworn testimony, that during the entire period of Mrs. Walker's tenure as a union officer, there was no "work stoppage, strike, or other interference with production the avowed objective of which was political, philosophical, subversive or revolutionary" (R. 13).

The most probable and natural interpretation of this unclear declaration regarding "sabotage, force, violence and the like" is that the Arbitrators intended to convey the idea that *the Company's beliefs* as to the implications of Communist Party membership were honestly held, as indicated, among other things, by the fact that these beliefs "were prevalently understood and shared", i.e. that a great many other persons were of the same opinion.[10] The reference to the "accuracy" of the Company's beliefs cannot have been meant as a finding that the beliefs were actually true, since the reference is followed by a recitation of the evidence which demonstrates that "accuracy", none of which relates to proof of "sabotage, force, violence and the like". Hence it must be concluded that the word "accuracy" was used in a sense akin to "reasonableness" or "plausibility". The entire tenor of the arbitration opinion supports this interpretation, including the fact that the Arbitrators, mature, experienced and responsible men, ordered the Company to take Mrs. Walker back into its employ.

i. **The Arbitrators' conclusions and award.**

The Arbitrators ruled that the issue before them was:

> ". . . was this discharge 'just' in the sense that it was based upon grounds reasonably related to the

[10] A further indication, previously noted, that the Arbitrators in the quoted passage were referring, not to any record evidence that Mrs. Walker personally was dedicated to sabotage, but to the widespread popular notion, which the Company professed to share, that membership in the Communist Party itself connotes a readiness to engage in sabotage, is the following extract from the Arbitrators' summary of the Company's arguments: "these authorities [various federal and state court decisions] show a conviction widely held that membership in the Communist Party includes an obligation to commit acts of sabotage and destruction" (R. 26).

employee's competence, performance and general suitability in the job; was the discharge based upon a motive by the Company to 'interfere with, restrain or coerce an employee because of membership or lawful activity in the Union'?" (R. 28).

They concluded that:

"Doris Walker was unjustly discharged, that the reasons assigned by the Company were not the real reasons and had been waived; and that the discharge interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation" (R. 32).

The actual award itself—as distinguished from the Board's "findings" and statement of reasons—was that:

". . . Doris Walker was discharged by Cutter Laboratories on October 6, 1949 in violation of Article I Section 3 and Article VIII Section 1 of the collective bargaining agreement dated July 23, 1948 as amended. She is entitled to reinstatement and to back pay limited by Article VIII Section 1 to eight (8) weeks full-time regular pay less any gross earnings or unemployment compensation during such period" (R. 32).

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4. THE PROCEEDINGS BELOW SUBSEQUENT TO THE ARBITRATION AWARD.

The Company having refused to reinstate Mrs. Walker in accordance with the Arbitrators' Award, the Petitioners, acting under California procedure,[11] petitioned

[11] Cal. Code Civ. Proc. Sections 1277, 1288.

the Superior Court for an Order confirming the Award (R. 2), and Respondent filed a motion to vacate the Award (R. 48). Respondent also filed an Answer in which it alleged, *inter alia*, that Doris Walker "was and now is an active member of the Communist Party, dedicated to said Party's program of subversion, espionage, sabotage, force and violence" (R. 36). In oblique recognition of the fact that the arbitration record was devoid of any evidence tending to prove the foregoing, Respondent, in a document entitled "Respondent's Objections and Proposed Amendments to Findings of Fact and Conclusions of Law and Order Confirming Award" (R. 77-78), asked the Superior Court for permission to present evidence in support of the allegations of the Answer charging Mrs. Walker with dedication to "subversion, espionage, sabotage, force and violence" (*ibid*). The Superior Court did not grant the requested permission to adduce additional evidence, and rendered judgment confirming the award (R. 81). It wrote an opinion (R. 75-77) in which among other grounds for its decision it mentioned the finding of the Board that during Mrs. Walker's tenure as a Union officer "there was no evidence of any work stoppage, strike or other interference with production, the avowed objective of which was political, philosophical, subversive or revolutionary" (R. 76).

Respondent appealed to the District Court of Appeal, which unanimously affirmed the judgment of the Superior Court.[12] Respondent then sought and obtained review by

[12]The opinion of the District Court of Appeal (122 A.C.A. 956) is set out in full in the Appendix to Petition for a Writ of Certiorari, pp. 54-77.

the Supreme Court of California, which by a vote of 4-3 reversed the judgment (R. 469-497), holding that despite the collective bargaining agreement and the arbitration award which had found the discharge of Mrs. Walker to be in violation of that agreement, the direction that she be reinstated to employment in "a plant which produces antibiotics used by both the military and civilians" is against public policy, as expressed in the following federal and state laws (R. 480-484):

1. Preamble to the Internal Security Act of 1950 (50 U.S.C.A. Sec. 781), enacted September 23, 1950.

2. Smith Act (18 U.S.C.A. Sec. 2385), originally enacted June 28, 1940.

3. Preamble to the Communist Control Act of 1954 (50 U.S.C.A. Sec. 841), enacted August 24, 1954.

4. California Criminal Syndicalism Act (Calif. Penal Code, Secs. 11400-11402), enacted in 1919.

5. California Government Code, Section 1027.5, enacted in 1953, and Section 1028, enacted in 1947.

The majority opinion likewise referred to various court decisions said to be also indicative of such public policy (R. 485-487, 489-490).

Mr. Justice Traynor, joined by Mr. Chief Justice Gibson and Mr. Justice Carter, dissented on the grounds that the decision of the majority abrogated by judicial fiat the right of employers and unions to contract for the employment of Communists, and also the right of Communists as a class to enter into binding contracts, and that Congress has already established in the Internal Security Act of 1950 (50 U.S.C.A. Secs. 781 et seq.) the

policy of the United States with respect to the employment of Communists (R. 490-497).

On February 16, 1955 the Supreme Court, by the same vote, denied a petition for rehearing (R. 523).

SUMMARY OF ARGUMENT.

1. The "public policy" ruling of the California Supreme Court which resulted in Mrs. Walker's disqualification for employment violates the due process and equal protection provisions of the Fourteenth Amendment. The ruling, that all Communists are conclusively presumed to be dedicated to sabotage and like crimes of violence, was applied against Mrs. Walker despite the complete absence from the record of any proof showing that she personally had any such belief or propensity, and despite convincing evidence to the contrary. The operation of the public policy ruling in Mrs. Walker's case was therefore purely that of a condemnation by association. Furthermore, the basis adduced in support of the conclusive presumption as to Communist Party doctrine as such was not any evidence in the present record—which is as devoid of proof of Communist Party sabotage doctrine as it is of Mrs. Walker's sabotage propensities—but a number of legislative "findings" (e.g. the Internal Security Act of 1950 and the Communist Control Act of 1954) and language from several court decisions denouncing Communist doctrine, of which the court below took "judicial notice." Nothing in the decisions of this Court, either in the current 'Cold War' period or at any earlier time, gives the slightest justification for the assumption of the court

below that its conclusive presumption branding all Communists as saboteurs, etc. is definitively established as a matter of law or otherwise as a matter of "judicial notice". On the contrary, the reiterated theme of this Court's decisions pertaining to the subject is that no such presumption of group criminality is to be countenanced and that fair, individualized adjudication is required in any case where penal or other adverse legal consequences are sought to be visited upon a person for his adherence to Communist or other allegedly subversive groups. *Schneiderman v. United States*, 320 U.S. 118, 157; *Dennis v. United States*, 341 U.S. 494, 516; *Communications Assn. v. Douds*, 339 U.S. 382, 404; *Emspak v. United States*, 349 U.S. 190; *Quinn v. United States*, 349 U.S. 155; *Peters v. Hobby*, 349 U.S. 331, 345; *Anti-Fascist Committee v. McGrath*, 341 U.S. 123; *Garner v. Los Angeles Board*, 341 U.S. 716, 723-724; *Adler v. Board of Education*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183, 190-192.

Unsupported by any evidence pointing to a propensity for sabotage on Mrs. Walker's part personally, or by any judicially noticeable "proof" of doctrinal dedication to sabotage on the part of Communists generally, the decision below and its conclusive presumption must stand bare, on their own footing, for purposes of Fourteenth Amendment scrutiny.

The decision and its underlying presumption are patently in violation of the Fourteenth Amendment. Giving the decision—a "public policy" decision amounting to judicial "legislation"—the benefit of such presumption of constitutionality as may attach to an act of a State

legislature, the consequence, in the first place, is that the ordinary presumption of constitutionality does not apply because we are here in the area of "First Amendment" rights. *Kovacs v. Cooper*, 336 U.S. 77, 78. But, secondly, even if the conventional presumption of constitutionality is applied, the invasion of the Union's and Mrs. Walker's contract rights, and of Mrs. Walker's rights to engage in one of the ordinary occupations of life (*Meyer v. Nebraska*, 262 U.S. 390, 399; *Allgeyer v. Louisiana*, 165 U.S. 578, 589-592; *Peters v. Hobby*, 349 U.S. 331, 352 (concurring opinion)) is impermissible. Substantive due process requires a permitted legislative object and reasonable means for the accomplishment thereof. It is even doubtful whether a State has the power to deal at all with the subject matter of safeguarding private employment against "security risks" in the context of the present national policy of defense against the domestic and foreign "Communist menace". But, passing this difficulty (which we treat as a separate Point), it is not doubtful that the *means* proposed by the decision below for accomplishing such "security" in the private employment field are so arbitrary, oppressive and lacking in sensible relation to the end sought to be achieved, as to violate due process reasonableness in a manifestly inordinate degree. The constitutional posture of the matter may be conveniently discerned by considering what would be the minimum substantive due process essentials of a valid State legislative "security risk" program for private industry. Surely, in view of the principle generally disfavoring the unnecessary relinquishment of governmental powers to private persons (*Carter v. Carter Coal*

Co., 298 U.S. 238; *Eubank v. Richmond*, 226 U.S. 137) and the exceptionally acute possibilities of abuse which inhere in any such relinquishment in a case like the present one, the program would be required to be conducted under effective governmental administration and control. And any such governmental program would have to function on a properly adjudicated, and duly reviewed, *individual* "risk" basis—weighing the "risk" propensities of the individual employee in relation to the particular job involved.

But the program brought into being by the decision below not only reposes its ominous powers in a numberless host of private employers, thereby abdicating governmental responsibility and thwarting governmentally administered standards of fairness; it also is utterly barren of even so much as a proposed or recommended (much less required) standard of proper adjudication of individual cases. For it lays down a conclusive presumption that every Communist employee is a sabotage, etc. "risk". Thus it eliminates all need for notice and hearing on the issue of the individual's propensity for such violent behavior. But, further, even the individual's opportunity for fair defense as to the issue of Communist Party membership as such is largely rendered ineffectual, because the decision below virtually forces the peremptory dismissal of every employee who is even colorably suspected of being a Communist, i.e., the decision expressly places employers on warning that they will be deemed without tenable legal defense to actions for damages for injury caused by sabotage of employees as to whom the employer had prior knowledge pointing to Communist Party membership.

The same arbitrariness and lack of any reasonable means or method for determining which persons are actual "risks" apply in the determination of which jobs or places of work are "sensitive"; the latter determination is left to the free discretion of each private employer in his own business, no standards whatever being laid down except vague references to national defense and military security against industrial sabotage, and no governmental supervision or review being provided for the employer's self-declaration of security "sensitivity". In this very case the employer's business is not within any of the federal "industrial security" programs.

The methods of judicial notice and irrebuttable presumption by which the state court hands over all Communist employees to the above kind of privately administered security risk program are not only unjustifiable on the basis previously mentioned—i.e., the non-existence of any pertinent judicially noticeable "facts" established by decisions of this Court adjudicating Communist Party doctrine or the propensities of Communists as a group; such methods are forbidden in any event by the constitutional restrictions against improper evidentiary presumptions generally (*Tot v. United States*, 319 U.S. 463, 467; *Manley v. Georgia*, 279 U.S. 1, 6) and, in particular, against presumptive declarations of individual guilt based solely on association (*Wieman v. Updegraff*, 344 U.S. 183; *Schneiderman v. United States*, 320 U.S. 118, 157).

In the last-mentioned aspect of the decision below the violations against due process coalesce with those against equal protection (cf. *Truax v. Corrigan*, 257 U.S. 312, 331-333); for whatever may be the propriety of judi-

cially noticing or conclusively presuming the doctrines of the Communist Party, it is a long step from that to an arbitrary and discriminatory rule of law which assumes, contrary to experience and without valid evidentiary support, that every member of the Communist Party is personally dedicated to "sabotage, force, violence and the like."

Implicit in the substantive due process offensiveness of the decision below is a concurrent offensiveness in terms of procedural due process. The conclusive presumption that Communists are dedicated to sabotage precludes all notice and hearing whatsoever on the issues both of Communist Party doctrine and individual propensities. In the present case this procedural injustice has operated with special oppressiveness, moreover, because not until the decision of the court below was announced had petitioners had any notice that any of the adjudicating bodies in the case regarded the latter issues as material.

Finally, our due process contentions would not be disposed of even should this Court rule that Communist Party doctrine as to sabotage, etc. may be judicially noticed. For there would still remain the issue of Mrs. Walker's personal beliefs and propensities in regard to "sabotage, force, violence and the like". Her discharge cannot be sustained unless that issue is resolved against her, which is impossible on the present record in the light of the constitutional ban against guilt by conclusive presumption without individualized adjudication and proof of *scienter*.

2. The decision below offends also against the constitutional provisions forbidding bills of attainder. U. S.

Const., Art. I, Secs. 9, 10. The decision attributes to Mrs. Walker guilt as to, or preparation or intent for the commission of, several serious crimes, including violation of federal and state sedition laws, and conspiracy to commit sabotage. Those attributions, however, are based on no judicial trial and conviction of Mrs. Walker on any such charges, or on any proof whatsoever relating thereto in any way in this Record. The condemnation of Mrs. Walker is accomplished by giving effect to federal and state statutes as legislative adjudications condemning all Communists, indiscriminately. Mrs. Walker's punishment for this assimilatively derived guilt by legislation is that she is dismissed from her job and branded ineligible for any job in a major portion of the nation's private employments, and in all public employments.

By so giving effect to the aforementioned legislation, and by imposing punishment as aforesaid, the court below endowed the situation with the classic qualities of bills of attainder. *Cummings v. Missouri,* 4 Wall. 277, 320-323; *Ex parte Garland,* 4 Wall. 333, 377; *United States v. Lovett,* 328 U.S. 303, 315-316. The deprivation of privileges which has here occurred constitutes punishment in the sense of attainder, if the grounds for deprivation have no reasonable relation to the fitness of persons to utilize or enjoy the privileges. *Garner v. Los Angeles Board,* 341 U.S. 716, 722; *Hawker v. New York,* 170 U.S. 189, 198; *Cummings v. Missouri, supra,* 4 Wall., at 320. No such reasonable relation was present here. The disabilities are imposed solely because of association, without reference to the fitness of the individual involved, or the type of work, or the question of her *scienter* of the alleg-

edly violent and destructive program of the Communist Party.

The decisions of this Court in *Communications Assn. v. Douds*, 339 U.S. 382, and *Garner v. Los Angeles Board*, 341 U.S. 716, which are supposed to have narrowed the constitutional protections against bills of attainder, are readily distinguished from the present case. Here there is a conclusive disqualification on the basis of *past conduct* (the vice which was held not to be present in the *Douds* case). Here also there is not afforded the saving grace of the requirement of *scienter* (the presence of which in the *Garner* case was the ground for the Court's rejecting the argument of attainder).

3. The decision below, by applying a number of recently enacted statutes so as to invalidate the Union contract herein, which predates those statutes, gives to those statutes the effect of laws impairing the obligation of contracts, in violation of Article I, Sec. 10, of the Constitution.

The collective bargaining contract involved in this case was entered into on July 23, 1948 (R. 6). Mrs. Walker's right to invoke the remedies set out in the contract vested on the date of her discharge, October 6, 1949 (R. 14). The "public policy" ruling by which the court below invalidated the said contract did not come into existence until after October 6, 1949, because it is based on findings recited in State and federal legislation enacted after that date, e.g., the Internal Security Act of 1950 and the Communist Control Act of 1954.

The unconstitutionally impairing effect of the decision below stems from the statutory policy which was con-

strued as requiring that decision. *Columbia Ry. v. South Carolina*, 261 U.S. 236, 245; *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 453. Nor is the impairing effect of the statutes avoided because some of them are federal rather than State laws. *Ashton v. Cameron County Dist.*, 298 U.S. 513, 531. Cf. *Gunn v. Barry*, 15 Wall. 610, 623. Nor does the asserted illegality of the contract on grounds of public policy preclude this Court from determining the question of statutory impairment. This Court may independently determine the question of contractual validity. *Seton Hall College v. South Orange*, 242 U.S. 100; *Atlantic Coast Line v. Goldsboro*, 232 U.S. 548.

4. The State of California is debarred, by the supremacy clause of Art. VI, Sec. 2, of the United States Constitution, from acting in the security risk area affecting private employment, because Congress has preempted and fully occupied the field of legislation as to employment rights of Communists. 50 U.S.C. Sec. 781, et seq. (the Internal Security Act of 1950). The field involved is one of dominant federal interest and responsibility. U. S. Constitution, Art. I, Sec. 8, Cl. 1, and Art. IV, Sec. 4; 50 U.S.C., Sec. 781. (15). Cf. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318; Brief for the United States as *amicus curiae* (P. 11) in *Commonwealth of Pennsylvania v. Steve Nelson*, October Term, 1955, No. 10, cert. granted October 14, 1954, argued this Term. It is not a field in which there is a traditional State power to act, especially in light of the international aspects of this country's policy approach to the "Communist problem," and the consequently close connection with the field of foreign relations. Cf. *Hines v. Davidowitz*, 312 U.S. 52, 63.

The instant case involves precisely the kind of conflicting state-federal *regulatory* systems which the Solicitor General in the *Nelson* case asserts to be condemned by the supremacy clause. The evils of the regulatory conflict in this case are aggravated by the breadth, indefiniteness and general unworkability of a scheme of security screening dependent on a case-by-case application by the courts of an imprecise public policy standard.

5. Federal supremacy is undermined by the decision below in another field, that of labor relations. A series of decisions by this Court, recently recapitulated in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, have settled that State action, whether legislative or judicial, may not stand when it is in conflict with the federal labor policy. ". . . a state may not prohibit the exercise of rights which the federal Acts protect." *Ibid*, at p. 474. The federal policy and the federally protected rights in question are established in three provisions of the Labor-Management Relations Act of 1947 (29 U.S.C. 141 et seq.), namely, Section 7 (29 U.S.C. 157), Section 8(a)(1) (29 U.S.C. 158(a)(1)), and Section 8(a)(3) (29 U.S.C. 158(a)(3)), which respectively preserve the rights of free collective bargaining, freedom from interference or coercion by employers in the exercise of those rights, and freedom from discrimination on account of union membership or activity.

The decision below is in irreconcilable conflict with the above provisions of the Labor-Management Relations Act. The discriminatory discharge of the leader of the Union, a discharge found to have been deliberately timed to take effect at the moment when it could most weaken the

Union, is said to be justified if the immediate victim happens to be a Communist. The Union's interest in the matter is given no weight, the matter being treated as if it were merely one between the discharged employee and the employer. Section 8(a)(3) of the Labor-Management Relations Act is thus set at naught.

It is not unusual for an employer to attempt to justify a discharge on grounds which, if they were the true reason for the discharge, would involve no violation of federal labor legislation. In such cases, however, where it is found by a court that the real reason for the discharge is union activities, the federal legislation is deemed violated. E.g., *N.L.R.B. v. L. Ronney & Sons,* 206 F. 2d 730 (C.A.9, 1953), cert den. 346 U.S. 730, rehearing denied 347 U.S. 914.

There is no reason for refusing to apply the foregoing principle to cases where the ostensible reason for discharge is Communism. Congress wrote no such exception into the Taft-Hartley Act. Nor have the federal courts construed the Act as so excepting Communists from the statutory protection against discriminatory discharge. E.g. *N.L.R.B. v. Pratt, Read & Co.,* 191 F. 2d 1006 (C.A. 2, 1951); *N.L.R.B. v Fulton Bag & Cotton Mills,* 180 F. 2d 68 (C.A. 10, 1950). The failure of Congress to exclude Communists from such protection cannot be deemed inadvertent. Cf., *Communications Assn. v. Douds,* 339 U.S. 382, applying 29 U.S.C. 159(h). The decision below grafts an amendment onto the Taft-Hartley Act which is contrary to its terms and to authoritative judicial interpretation.

ARGUMENT.

INTRODUCTORY.

Whatever may be the power of a State government to provide for the screening of "security risks" in private industry—and we argue later that such a power, if it exists, is vested in the federal government rather than in the States—there can be no quarrel with the principle that no State can deal with the matter in such a way as to violate the due process and equal protection guarantees of the Fourteenth Amendment. It is submitted that the decision below promulgates a "public policy" for the regulation of private employment which is substantively arbitrary and procedurally indefensible. It presumptively and conclusively labels all Communists as being *ipso facto* potential saboteurs, indiscriminately disqualifies them for work in an undefinably large proportion of the country's private employments, and nullifies the employment rights secured to them by collective bargaining agreements. It is a "policy" which deems unnecessary any provision for individualized adjudication of the "risk" proclivities or propensities of particular employees, addressing itself solely to the bare fact of Communist Party membership. It makes no provision for a weighing of the actual "risk" presented by the individual in the particular job involved. The facts of record in this very case, where a Board of Arbitration had extensively weighed the "risk" and ordered reinstatement, were simply waved aside by the court below. Indeed, its indiscriminate approach to the "security" question led the court below into an outright misreading of the Arbitrators' findings on one of the most important issues in the case, the issue of whether Mrs. Walker personally was dedicated to "sabotage, force,

violence and the like". Given a governmental "policy" thus bereft of the essential qualities which due process and equal protection demand, a policy so excessive and oppressive that it passes all reasonable limits of permitted exercise of governmental power, it will not be surprising if the main social incidence of such a policy should turn out to be (as the present Record dramatically illustrates) the placement in the hands of private employers of a weapon ideally designed for intimidating employees and wrecking unions.

We have spoken above of the issues of this case as ones of governmental power, although the "security" ouster of the unwanted employee in this case was effected initially by her private employer and not by any governmental instrumentality. The case became one of governmental action when the highest court of the State held, as part of its "public policy" ruling, that the judicial processes of the State are not available to enforce the union-contract job-tenure rights of Communists. As suggested above, it but adds to the due process offensiveness of the State governmental action that the power to execute the judicially declared "public policy" favoring "security" screening and ouster of Communists, should have been conferred by the court below upon the private employer.

In the points which follow we shall give precedence to the Fourteenth Amendment issues, it being the belief of counsel that those issues represent the central constitutional feature of the case.

POINT ONE.

SINCE THERE WAS NEITHER EVIDENCE NOR FINDING THAT MRS. WALKER PERSONALLY WAS DEDICATED TO "SABOTAGE, FORCE, VIOLENCE AND THE LIKE", THE HOLDING OF THE COURT BELOW DISQUALIFYING HER FOR EMPLOYMENT ON THE BASIS OF A CONCLUSIVE PRESUMPTION THAT ALL COMMUNISTS ARE SO DEDICATED, VIOLATED THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE FOURTEENTH AMENDMENT.

A. The absence of evidence or finding that Mrs. Walker personally was dedicated to "sabotage, force, violence and the like", and the strong indications to the contrary.

In the Statement we marshalled at some length our reasons for asserting categorically that the record is completely devoid of any evidence that Mrs. Walker—or for that matter the Communist Party—was dedicated to industrial sabotage. We noted that even the Company inferentially conceded the lack of such evidence, as witness its unsuccessful attempt to persuade the Superior Court to reopen the record to adduce evidence with respect to the point. Our analysis likewise indicated that the Arbitrators' somewhat ambiguous reference to "sabotage, force, violence and the like" could not possibly be regarded as a "finding" that Mrs. Walker possessed such propensities, especially in the light of the Board's complimentary reference to the exemplary strike record of the Union under Mrs. Walker's leadership.[13] Consequently,

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[13] In a case, which, like the instant one, presents a claim of denial of federal constitutional rights (including First Amendment rights), this Court will of course examine the record to determine the sufficiency of the factual conclusion on which the denial of such rights was based—the pertinent factual conclusion here deriving from the interpretation by the court below of the Arbitrators' ambiguous reference to the "accuracy" of the Company's beliefs regarding Communist Party doctrine as to "sabotage" etc. and Mrs. Walker's "dedication" to such supposed doctrine. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110,

we shall not again review the material on this point, but shall pass on to a discussion of the Fourteenth Amendment problems raised by the State court's attribution to Mrs. Walker of criminal traits solely on the basis of the alleged characteristics of Communists as a class.

B. The view of the Court below that all Communists are to be conclusively presumed to be dedicated to "sabotage", etc., rests on the erroneous assumption that such view is definitively established in the United States as a matter of law.

The reasoning of the majority Justices below apparently takes for granted that it is authoritatively settled in the United States as a matter of law (i.e. as a matter of "public policy" grounded on a conclusive presumption), that all Communists *ipso facto* are to be regarded as presenting an ever-imminent threat of violence and crime of the most destructive kinds, including sabotage, forcible sedition and even "treason" (R. 480-490).

While the Constitution reigns it is doubtful that any such sweeping determination will ever issue from this Court. Cf., *Schneiderman v. United States,* 320 U.S. 118, 157. On the contrary, recent decisions of the Court have emphasized the fact that punishment under laws aimed at Communists or "subversives" must rest upon an individual determination of guilt. In *Dennis v. United States,* 341 U.S. 494, 516, the Court cautioned that conviction of the particular defendants in that case was not intended to foreclose fair consideration of future cases

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121; *Feiner v. New York,* 340 U.S. 315, 316; *Oyama v. California,* 332 U.S. 633, 636; *Norris v. Alabama,* 294 U.S. 587, 590; *Truax v. Corrigan,* 257 U.S. 312, 324. *A fortiori,* the Court will so examine the record where it is claimed that "there was no evidence whatever to support" the aggrieving factual determination. *Creswill v. Knights of Pythias,* 225 U.S. 246, 261.

on the issue of individual defendants' advocacy of force or violence, a caution the significance of which is perhaps underscored by the several recent orders granting certiorari to review later Smith Act convictions.

The Court's disinclination to encourage doctrines of general proscription of Communists as a class, and its emphasis on the right of duly individualized adjudication in this area, has been manifested not only in regard to the Smith Act, but also in a variety of other situations. We call attention, for example, to the scrupulous limitation by the Court of the scope of its holding in *Communications Association v. Douds*, 339 U.S. 382, 404;[14] the disapproval of attempts to "smear" individuals as assertedly self-condemned Communists by reason of their use of the Fifth Amendment privilege to decline to testify against themselves, *Emspak v. United States*, 349 U.S. 190 and *Quinn v. United States*, 349 U.S. 155; the Court's remarks in *Peters v. Hobby*, 349 U.S. 331, 345, pointing to the importance, in terms of fair procedure, of judging an employee's loyalty on the basis of his character and

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[14] "Section 9 (h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of the public by members of the described groups." 339 U.S. at p. 404. See *Farmer v. United Electrical Workers*, 211 F. 2d 36-39 (C.A.D.C. 1953) cert. den. 347 U.S. 948, holding that the filing of a false oath under section 9 (h) of the Taft-Hartley Act (29 U.S.C. § 159 (h)) does not carry any imputative consequences against the union and its members so as to justify denying to them the facilities of the National Labor Relations Board. See also *National Labor Relations Board v. Pratt, Read & Co.*, 191 F. 2d 1006 (C.A. 2, 1951) (section 9 (h) does not justify discharge of an employee for adhering to a union which had not filed the required non-Communist affidavits).

his actions and his duties"; the position taken by four of the majority Justices in *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, that the listing of organizations by the Attorney General as "subversive" under President Truman's Executive Order 9835, may not properly be done without notice and hearing;[15] the conditional basis of the decision in *Garner v. Los Angeles Board*, 341 U.S. 716, 723-724, whereby the Court's approval of an oath requirement for public employees (oath of non-membership for preceding five years in organizations favoring force or violence) was conditional on a requirement of *scienter* which the Court presumed would be met in order to avoid unconstitutionality;[16] and the similarly conditional basis of decision in *Adler v. Board of Education*, 342 U.S. 485, approving a teachers' loyalty law because of the presence in the statute of provisions for proper procedures for notice and hearing both as to listing of disapproved organizations and as to the conduct and views of the individual teacher, and emphasizing especially that certain statutory presumptions involved were merely *prima facie* and therefore rebuttable.

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[15]Cf. *United States v. Remington*, 191 F. 2d 246, 252 (C.A. 2, 1951), motion den. 342 U.S. 895; cert. den. 343 U.S. 907: "Over defense objections the prosecutor was permitted to make numerous references to the Attorney General's list of subversive organizations during the defendant's cross-examination. This was error, for the list is a purely hearsay declaration by the Attorney General, and could have no probative value in the trial of this defendant [citing the *Joint Anti-Fascist* case]. It has no competency to prove the subversive character of the listed associations and, failing that, it could have no conceivable tendency to prove the defendant's alleged perjury even if it were shown that he belonged to some or all of the organizations listed."

[16]Cf. *Wieman v. Updegraff*, 344 U.S. 183, 190-192, where *scienter* was foreclosed and the oath requirement was held void.

The closest that this Court has come to any expression of toleration for the current type of legislative or other official "findings" of a generally proscriptive or condemnatory character directed against Communists as a class was in *Galvan v. Press*, 347 U.S. 522, 529. There, however, the Court plainly indicated that its acceptance of the proscription was forced upon it by the long-settled principle of the non-reviewability of substantive Congressional policies in the unique area of admission and exclusion of aliens (347 U.S. at 530-532).

In sum, nothing in the decisions of this Court pertaining to the "Communist problem" gives the slightest justification for the kind of indiscriminate proscription of all Communists inherent in the decision below. Under the Constitution, as interpreted by this Court, guilt is still individual. This Court has not held, and we doubt that it will ever hold, that all Communists are *ipso facto* "dedicated to sabotage, force, violence and the like", and that any individual Communist may be punished for such crimes without the necessity of a judicial trial.

C. The "public policy" ruling below violates substantive due process and denies equal protection of the laws.

". . . Nothing is more certain in modern society than the principle that there are no absolutes, . . . all concepts are relative." *Dennis v. United States*, 341 U.S. 494, 508.

The above language, which was addressed to what the Court in the *Dennis* case considered a too-absolute argument as to the meaning of the "clear and present danger" rule, is applicable, *mutatis mutandis*, to the "public policy" holding of the court below, a holding

which is too-absolute in conclusively presuming all Communists to be potential saboteurs, spies and traitors.

1. No presumption of constitutionality attaches to the "judicial legislation" involved in the decision of the Court below in view of its impingement on First Amendment rights.

The action of the Supreme Court of California in this case, is, of course, "state action" for the purposes of Constitutional challenge under the Fourteenth Amendment. Cf, *Shelly v. Kraemer,* 334 U.S. 1; *Barrows v. Jackson,* 346 U.S. 249. The promulgation of a novel "public policy" by a court in litigation involving a dispute over enforceability of a contract obligation would seem to present a particularly clear instance of such "state action"; indeed, it is tantamount to legislation. Cf. *Williston, Contracts,* Secs. 1629, 1629A (Rev. Ed. 1936); Greenhood, *The Doctrine of Public Policy in the Law of Contracts* (1886), pp. 3-4.

It would seem that such a judicially declared public policy must meet *at least* the same tests of due process and equal protection as would be applicable in the case of legislation. We say "at least" the same tests, because court decisions, so far as we have been able to ascertain, have never been held to be entitled to the presumption of constitutionality enjoyed by acts of legislation.

Furthermore, even if the "public policy" ruling below be treated as merely declaratory of a policy of Congress and the State Legislature which the court supposed had been expressed by the various statutes on which it partially relied, the subject-matter of the statutes is not of the type to which the presumption of constitutionality

attaches. The substantive due process question in the present case arises out of a "public policy" determination which impinges directly on an individual's rights of political expression and political action. The State, acting through its judicial arm, sanctions the taking of a woman's job and the denial of her right to the protection of a union contract, all because of an assertion by the affected person of her rights of political association and free expression. These are matters within the scope of the First Amendment, and are protected against State infringement by the Fourteenth Amendment. It is well settled that when State action affecting First Amendment rights is challenged under the Fourteenth Amendment the usual presumption of constitutionality does not apply. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153; *Schneider v. State*, 308 U.S. 147, 161; *Thomas v. Collins*, 323 U.S. 516, 529; *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639; *Kovacs v. Cooper*, 336 U.S. 77, 88. See also authorities collected in Emerson and Haber, *Political and Civil Rights in the United States* (1952), pp. 426-427.

We expect, of course, a rejoinder from respondent in the manner pioneered by it in the proceedings below, namely, a highly colored, emotional insistence that "Communism is a criminal conspiracy", rather than a political movement, and that the First Amendment therefore has no application. This Court, however, commendably has not ceased to treat the "Communism" cases as involving First Amendment issues. See e.g., *Dennis v. United States*, 341 U.S. 494; *Communications Assn. v. Douds*, 339 U. S. 382; and from an earlier period: *DeJonge v. Oregon*, 299 U.S. 353; *Stromberg v. California*, 283 U.S. 359;

Whitney v. California, 274 U.S. 357; *Gitlow v. New York*, 268 U.S. 652.[17]

2. The Fourteenth Amendment impingements of the decision below upon the contract rights of all of the petitioners and upon Mrs. Walker's property and "First Amendment" rights.

In any event, the "public policy" ruling below fails the test of substantive due process irrespective of whether it is tested as legislation would be, and irrespective of which of the forms of presumption of constitutionality applicable in the case of legislation is applied here.

The substantive impingement of the decision below upon Mrs. Walker is that it nullifies her contract right under the collective bargaining agreement to be secure in her job against discriminatory discharge and discharge not based on "just cause", and that it deprives her of her right to be reinstated in her job. The decision deprives her of "First Amendment" freedoms by penalizing her for her alleged political beliefs and actions. As respects the Union, the decision nullifies *pro tanto* the Union's contract with Cutter as formulated by the collective bargaining agreement. The rights thus invaded are within the protection of the Fourteenth Amendment. As stated in *Meyer v. Nebraska*, 262 U.S. 390, 399, due

[17] In referring to the cases of this class as "First Amendment" cases, we have in mind, of course, the equivalence between the First Amendment as a limitation on federal interference with rights of expression and political rights, and the Fourteenth Amendment as an instrument imposing a like limitation on state interference with rights of the same class. E.g., the *DeJonge*, *Stromberg*, *Whitney*, and *Gitlow* cases, cited *supra*; see also *Near v. Minnesota*, 283 U.S. 697, 707. The "First Amendment" rights (and their Fourteenth Amendment equivalent) embrace not only rights purely of expression as such, but rights also of action, in the political area ("two concepts—freedom to believe and freedom to act"). *Cantwell v. Connecticut*, 310 U.S. 296, 303.

process "denotes . . . the right of the individual to contract" and "to engage in any of the common occupations of life". See also *Coppage v. Kansas*, 236 U.S. 1, 14; *Truax v. Raich*, 239 U.S. 33, 41-42; *Allgeyer v. Louisiana*, 165 U.S. 578, 589-592; *Slaughter House Cases*, 16 Wall. 36, 116, 122 (dissenting opinion). Cf. *Cummings v. Missouri*, 4 Wall. 277, 321. And see Mr. Justice Douglas, concurring in *Peters v. Hobby*, 349 U.S. 331, 352 (". . . one of man's most precious possessions is his right to work.")

3. The substantive due process offensiveness of the decision below when stripped of the support of the erroneous ruling as to Mrs. Walker's personal dedication to "sabotage", etc.

In Fourteenth Amendment terms, the unconstitutionality of the process by which the decision below worked its infringement of the substantive rights above mentioned may be simply shown. As we demonstrated previously, the assertion that Mrs. Walker was personally "dedicated to sabotage, force, violence and the like" cannot stand. In the absence of any evidentially supported finding in this case that Mrs. Walker was so "dedicated", the entire structure of the decision of the court below breaks down. All that remains is the blunderbuss "public policy" assault on the employment rights and employment contract rights of all Communists, who, indiscriminately and as an entire class, are conclusively presumed to be "dedicated" to the various modes of violent criminal conduct depicted by the court below.

(a) The minimum due process essentials of a "security risk" program for private employment.

A convenient way of discerning the substantive due process offensiveness of this "public policy" ruling is by contrasting it with what may be supposed, *arguendo*, to be the minimal constitutional essentials of a theoretically valid legislative program designed to accomplish the object of protecting "security-sensitive" private businesses against Communist employees who may be "dedicated" to sabotage and the like. How would the legislative draftsman go about the task? The two familiar formulary requisites of substantive due process are (a) existence of a permitted legislative object and (b) selection of means reasonably adapted to the accomplishment of such permitted object.[18] The draftsman (who here would be a State legislator) would encounter at the threshold the question of whether a State may deal with the instant subject matter at all, in view of the question of exclusive or paramount federal power in this part of the "security" area. We pass this question for the present, as it is the topic of a separate Point. Assuming, then (without conceding), that the State legislative draftsman could be said to be dealing with a permitted State legislative object, he would then be obliged to choose means for its accomplishment which would be *reasonably* adapted thereto. He would perceive at once that the substantive and procedural aspects of such a "security risk" program are inseparably connected with each other; the very essence of a *reasonable* accomplishment of the substantive objective lies in devising appropriate procedures for determin-

[18] E.g. *Virginian Ry. v. Federation*, 300 U.S. 515, 558; *Nebbia v. New York*, 291 U.S. 502, 525; *Muller v. Oregon*, 208 U.S. 412.

ing who are "security risks" in relation to particular employments determined to be "sensitive"; the *arbitrariness* which it is the fundamental aim of substantive due process to prevent, can be prevented in a situation of the present type only by appropriate procedural mechanisms.[19] Since the particular subject-matter here in question is one relating to private employment, a first need on the part of the hypothetical draftsman would therefore be to ensure that the drastic governmental powers whose exercise is proposed shall not be exercised by persons, or in ways, not subject to adequate governmental supervision and review. For the oft-condemned evil of unconstitutional abdication of governmental power to private persons[20] would present an especially grave threat of injustice in the framework of a "security risk" program for private employment in a period of "heated public opinion" (*Peters v. Hobby*, 349 U.S. 331, 345). The facts of industrial life being what they are, it is plain that a screening program administered by one of the contending parties in the industrial arena would be subject to serious abuse. A rational "security-risk program" would therefore have to be under effective governmental, rather than private, administration and control.[21]

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[19]Cf. *Missouri P. R. Co. v. Humes*, 115 U.S. 512, 519, 520; *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708. Cf. also Mr. Justice Frankfurter, concurring, in *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162-163.

[20]*Carter v. Carter Coal Co.*, 298 U.S. 238; *Seattle Trust Co. v. Roberge*, 278 U.S. 116; *Eubank v. Richmond*, 226 U.S. 137. See additional authorities collected in Davis, *Administrative Law* (1951), s. 21, and Gellhorn, *Administrative Law—Cases and Comments* (Second Ed. 1947), pp. 84-89.

[21]All of the existing federally instituted "industrial security risk" programs operative in plants of government contractors are under the thorough and close control of federal agencies. BNA

As to the means or method of carrying out such a governmentally conducted program, the basic requirements of substantive due process "reasonableness" would simply be, as above suggested, that appropriate procedures be provided for weighing the facts of each case of alleged "risk", i.e., a system of individualized adjudication and review (including judicial review at least as to issues of constitutional injury) which would accomplish the legislative object in a *reasonable* manner, not arbitrarily and without reasonable justification.

(b) The proscriptive operation of the public policy ruling below through its use of conclusive presumptions.

The above, we submit, would be the minimum essentials of substantive due process in a State governmental "security risk" program for "sensitive" private businesses, assuming, of course, without conceding, that the State has any right to intervene in an area which appears to be one of distinct federal concern. We do not suggest with particularity what procedures would constitutionally be required in regard to notice and hearing, burden of proof and the like, because the instant case does not reach such questions. The "public policy" approach of the court below spares itself any problems as to what kind of notice and hearing would be appropriate, because it contemplates *no* notice and hearing at all. The position of the court below amounts to nothing more nor less than governmental proscription. More than this, it is proscription not even limited to identified persons. It is proscription of a *class*, an "open-end" proscription, as it were. And

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Manual, *Government Security and Loyalty*, 21:1 et seq., 25:1 et seq. (1955).

as to burden of proof? The members of the proscribed class, Communists, are told that they are *conclusively presumed* to be "dedicated" to the commission of a number of serious crimes of violence. They are not to be permitted to prove the contrary, much less to request that the dread "dedication" charged against them be proved by their accusers.[22] Even when, as in the present case, a formidable trial record overwhelmingly contradicts the conclusive presumption declared by the "public policy", it avails nothing.

(c) The delegation to private employers of the initial function of screening and ousting "security risks", as effectively thwarting opportunities for fair hearing on the issue.

One drastice feature of the decision below renders largely ineffectual the opportunity of the individual employee for a fair hearing on the issue of whether or not he is a "security risk". We refer to the language in the opinion that, "Knowing the facts which the company knew, it is difficult to conceive of any tenable defense which it could make, or which would be entertained in this court, as against an action for damages in a personal injury or wrongful death case arising from the wilful adulteration of any of its products by Mrs. Walker if it continued her in its employ and she should thereafter take that means of party activity." (R. 488.) If we may paraphrase the above language of the court, "it is difficult to conceive" of any employer in the State of California who, upon reading the above language, would consider it

[22] In the words of the majority below: "That acts of sabotage by Communists are reasonably to be expected at any time such acts may be directed by the party leader *is not open to question* . . ." (R. 489; italics supplied).

wise or safe to postpone the firing of any employee as to whom there is colorable suspicion of Communist Party membership. This feature of the opinion below, it seems to us, wipes out the entire stage in security risk proceedings that normally occurs prior to judicial review. In practical effect, there is here eliminated the entire "trial" stage as such, and the only protection that the employee may get is a post-discharge appeal to a court—if he can afford it financially. The havoc which this could play not only with the human lives involved, but also with the normal processes of labor-management relations under collective bargaining agreements, is apparent. State action which is so manifestly excessive or oppressive, which goes inordinately further than is sensibly or reasonably necessary for the accomplishment of the particular permitted governmental object, lacks the reasonableness required by substantive due process; means which serve no reasonable purpose in the accomplishment of the permitted object, which gratuitously inflict excessive injury, cause oppression, or invade constitutionally protected interests in arbitrary ways, do not satisfy the requirements of substantive due process. Cf. *Allgeyer v. Louisiana*, 165 U.S. 578; *Meyer v. Nebraska*, 262 U.S. 390; *Yu Cong Eng v. Trinidad*, 271 U.S. 500; *Farrington v. Tokushige*, 273 U.S. 284. See Mr. Justice Frankfurter, concurring, in *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162-163.

(d) The lack of any reasonable method for determining what employments are subject to the public policy proclaimed by the Court below.

Not only in its arbitrary formula for ignoring the actual "risk" propensities of the individual employee by assimilating him into a proscribed class, and not only

in the arbitrary method which it uses for setting up that class proscription, but also in its treatment of the equally important question of what employments are subject to the public policy proclaimed by the decision below, the decision violates substantive due process. It is at least very doubtful, even in this time of "Cold War" tensions, whether any enlightened court would go so far as to find reasonable a governmental "security risk" program which excluded Communists from *all* occupations. An indispensable due process requirement of any security risk program would seem to be that it be confined to employments which are responsibly found to have a substantial relation to the governmental object of providing for the common defense. It is true that the majority opinion might be read as limiting the impact of the decision to Communists who are (1) "dedicated to . . . . 'sabotage, force, violence and the like' ", and (2) employed in "defense plants". But as to (1), there can be no doubt, as we have shown, that the imputation to Mrs. Walker of such beliefs must rest solely upon the finding of her membership in the Communist Party. And as to (2), while Cutter Laboratories manufactures biological and pharmaceutical products, including vaccines, which are used by both the military and civilians, the Arbitrators found (R. 11) that since World War II the Company has not been under any contract obligation to any agency of the Government to discharge employees who are bad "security risks". Cutter was not, during any of the times here in question within any of the Federal "industrial security programs". Cf. BNA Manual, *Government Security and Loyalty* (1955), 21:1 et seq. Nor, of course,

has Cutter been designated as a "defense facility" under the as yet inoperative Section 784(b) of the Internal Security Act of 1950 (50 U.S.C. Sec. 781 et seq.), authorizing the Secretary of Defense to determine and designate the defense facilities in which Communists may not be employed.

Furthermore, there are very few industries which cannot, under the logic of the majority opinion, be held to affect the nation's defense in a degree sufficient to warrant a court in barring Communists from employment. The public policy pronouncements of the opinion are broad enough to apply to every butcher, baker and candlestick maker (at least if any of their products is used by the armed services), since a Communist in the employ of any of them might put poison in the meat, ground glass in the bread, or concealed explosives in the candlesticks. The possibility that something of the sort might occur, despite the absence of the slightest proof that the employee in question believes in or condones such criminal activities, and, indeed *in the presence of compelling evidence to the contrary,* is held to require the discharge of an employee believed to be a Communist—even though the employment in question is of the most innocuous kind and the business of the employer is no more "sensitive" than that of thousands of other businesses which the federal government has not seen fit to bring under "security risk" control. It matters not that the employer, for two and one half years after he has become convinced that the employee is a Communist, demonstrates his confidence in her by allowing her free and unrestricted movement throughout the plant. It matters not that the employer holds his

knowledge of the employee's Communist affiliations in his hip pocket until he gets a chance to use it in order to weaken or destroy the Union of which the employee is the President and moving spirit. As seen, according to the majority opinion, any employer having reason to believe that an employee is a Communist, who fails to discharge that employee—union agreements to the contrary notwithstanding—would have no "tenable defense . . . as against an action for damages in a personal injury or wrongful death case arising from the wilful adulteration of its product . . ." (R. 488.). What employer, faced with that dictum from the highest court of California, could be expected to retain a known or suspected Communist in his employ in any business which by the farthest stretch of imagination could be regarded as affecting the national defense? Clearly, the failure of the decision below to provide any guide to the determination of what industries or occupations are subject to the court's public policy formula, further offends the constitutional guarantee of substantive due process.

(e) The offensiveness to due process and equal protection of the lower Court's resort to judicial notice and irrebuttable presumptions in support of its public policy position.

As suggested earlier, even if we were dealing in this case with a legislative act providing for the things contemplated in the "security risk" program devised by the court below, the limited scope of the judicial inquiry into the "legislative facts" that is usually allowable in deciding substantive due process issues, would not necessarily be applicable in this case, owing to the "First Amendment" aspects of the "Communist security risk" prob-

lem; and further, since we are dealing in any event with a judicial decision instead of with legislation—albeit the decision purports to rest in part on legislative foundations—this branch of the substantive due process inquiry need not (and indeed logically cannot) follow in all respects the pattern of cases involving legislation.

The assumption which underlies the "public policy" ruling of the court below is, as previously mentioned, that all Communists are so unquestionably dedicated to "sabotage, force, violence and the like", that the point may be conclusively presumed as a matter of law. The court derived this conclusive presumption by a supposed process of judicial notice. The matters of which the court took judicial notice were "findings" set forth in a number of statutes and language from a number of judicial opinions; the court referred also to "the common knowledge of mankind" (R. 487) and to certain remarks by President Eisenhower. There is no need to repeat here the authorities earlier cited and discussed which show that it was impermissible for the court to conclude that belief in the unanimous dedication of all Communists to "sabotage", etc., has the status of a proposition definitively established as a matter of law. Perhaps—and we think it doubtful—the doctrines of the Communist Party may be noticed judicially, although it would appear to be stretching the theory of judicial notice to the breaking point to hold that it may be applied to such a hotly disputed issue; witness the lengthy Smith Act trials with their records filled with sharply opposed quotations and interpretations of Communist doctrine. See *Communist Party v. Peek*, 20 Cal. 2d 536, overruled *sub silentio* by the decision.

below. The power to prescribe rules of evidence, including presumptions, in judicial or administrative proceedings is limited by the due process clause, which forbids the substitution of legislative fiat for proofs. See *Tot v. United States*, 319 U.S. 463, 467; *Manley v. Georgia*, 279 U.S. 1, 6. See also *Adler v. Board of Education*, 342 U.S. 485, 496; *Western & Atlantic Railroad v. Henderson*, 279 U.S. 639; *McFarland v. American Sugar Co.*, 241 U.S. 79; *Bailey v. Alabama*, 219 U.S. 219.

In any event, whatever may be the propriety of judicially noticing or conclusively presuming the doctrines of the Communist Party, it is a long step from that to taking judicial notice that every member of the Communist Party is personally dedicated to "sabotage, force, violence and the like". For, in addition to the considerations relating to the substantive due process aspects of the question thus far mentioned, there is the aspect also of what has come to be known as "guilt by association". Here "due process" and "equal protection" coalesce. Cf. *Truax v. Corrigan*, 257 U.S. 312, 331-333. In *Schneiderman v. United States*, 320 U.S. 118, 157, the Court pointed out that it is by no means clear that advocacy of violent overthrow of government is a Communist objective and insisted that "under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe to all of its platforms or asserted principles." (Ibid, p. 136).[23]

[23]The Government in the *Schneiderman* case even admitted, with what the Court termed "commendable candor" (320 U.S. at 148), "the presence of sharply conflicting views on the issue of force and violence as a Party principle".

below has chosen to enact through the imprecise method of a declaration of public policy, what Congress has expressly declined to enact through the far more precise and workable method of legislation. In so doing the court has trespassed upon a field which the Congress, both by its actions and by its failure to act,[29] has demonstrated an intention to reserve to itself, and one, moreover, "so intimately blended and intertwined with responsibilities of the national government" (*Hines v. Davidowitz*, 312 U.S. 52, 66) that its nature alone raises an inference of exclusion of State action.

There is presently pending before this Court the case of *Commonwealth of Pennsylvania v. Steve Nelson*, October Term 1955, No. 10, certiorari granted October 14, 1954, which poses cognate questions concerning the respective spheres of national and State action in the field of internal security. The legal authorities and the various considerations pertinent to the questions arising from

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ernment's military purchasing agencies maintain a wide network of "industrial security programs", none of which affects Cutter Laboratories, Inc.

[29]During the last session of Congress twin measures (S. 3428 and H. J. Res. 527) were introduced which sought to impose a blanket ban on the employability of Communists in defense industries. The bills failed of passage. The House Judiciary Committee, in its adverse report on H. J. Res. 527, declared that "the language of the proposed measure is not sufficiently carefully drawn so as to enhance the security of the United States on the one hand, but not to limit the constitutional rights of individuals on the other hand". Declaring that it lacked sufficient information on the subject to enable it to present appropriate legislation to the House for passage, and rather than recommend "measures hastily drawn and obviously inadequate", the Judiciary Committee went on to urge "a thorough study by an impartial public commission appointed by the President of the United States should be made so as to give the Congress the benefit of impartial study and expert recommendations".

Undoubtedly, guilt by mere membership in the Communist Party, a form of guilt by association, would commend itself to some as an admirably simple way of solving the "Communist problem". The due process and equal protection clauses of the Fourteenth Amendment, however, stand in the way of such a "solution". The due process obstacles inhere in everything which we have heretofore presented in this Point. The equal protection clause condemns as arbitrary and discriminatory a rule of law which assumes, contrary to experience and without valid proof, that every member of the Communist Party is ready to commit such monstrous crimes as sabotage, sedition and treason. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356; *Truax v. Raich*, 239 U.S. 33, 41; *Korematsu v. United States*, 323 U.S. 214, 216; *Kotch v. Board of River Pilot Commissioners*, 3 U.S. 552, 556.

That the principle that guilt is personal, rather than established merely by association, has not vanished from our law since the day of the *Schneidermann* decision[24] is indicated by holdings such as *Wieman v. Updegraff*, 344 U.S. 183; *Adler v. Board of Education*, 342 U.S. 485; *Garner v. Los Angeles Board*, 341 U.S. 716; and *Gerende v. Board of Supervisors*, 341 U.S. 56. Central to each of these decisions is the concept that guilty knowledge of the doctrines of a party or organization may not, without more, be imputed to every member thereof by reason of membership alone. Government employees were the beneficiaries of these enlightened decisions, but there

[24]See also Mr. Justice Brandeis, concurring, in *Whitney v. California*, 274 U.S. 357, 373; *DeJonge v. Oregon*, 299 U.S. 353.

such concurrent State and federal legislative efforts have been extensively presented to the Court in the briefs of the parties and the numerous *amici curiae*, including the brief for the United States as *amicus curiae*, in the *Steve Nelson* case, and we shall therefore abbreviate our presentation on this subject.

The power which has been exercised by the federal government in enacting the Internal Security Act of 1950, arises from the highest form of constitutional authority. As stated in the aforementioned brief of the Solicitor General in the *Steve Nelson* case (p. 16), and as specifically noted by Congress in enacting the Internal Security Act of 1950 (50 U.S.C. Sec. 781 (15)), the power derives both from Article I, Section 8, of the Constitution which gives Congress the power to "provide for the common Defence and general Welfare of the United States", and from Article IV, Section 4, thereof, stating that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and . . . against domestic Violence".

The power to provide for the common defense is of the highest nature, and like the power to wage war and conclude peace "if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality" (*United States v. Curtiss-Wright Corp.*, 299 U.S. 304, at 318).

Furthermore, the problem is not a local one, suitable for local handling. The Solicitor General in his aforementioned brief (p. 11) notes that it is a "national problem which calls for solution on a national scale". We

is no reason for denying the benefit of the principle to an employee of a private employer.

It is submitted that the decision below works a denial of both substantive due process and of the equal protection of the laws.

D. The decision below also violates procedural due process.

The respects in which the decision below works a deprivation of procedural due process are largely implicit in the argument already presented as to the substantive due process vices of the decision, namely, the arbitrariness of the methods employed in attempting to apply the court's security risk program. By substituting judicial notice and irrebuttable presumptions for proper notice and hearing procedures with respect to the doctrines of the Communist Party and, *a fortiori*, Mrs. Walker's own political views and propensities, the court deprived the petitioners of procedural due process o law.[25]

It should be noted that in none of the tribunals which preceded the California Supreme Court, i.e., the Board of Arbitration, the Superior Court and the District Court of Appeal, were the doctrines of the Communist Party, or Mrs. Walker's own propensities for sabotage,

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[25] A "fair trial", one that would meet the procedural requirements of due process, includes: reasonable notice of the charges, *In re Oliver*, 333 U.S. 257; *United States v. Cruikshank*, 92 U.S. 542, 558; the right to a hearing, *Shields v. Utah Idaho R. Co.*, 305 U.S. 177; *Morgan v. United States*, 304 U.S. 1; *Palko v. Connecticut*, 302 U.S. 319, 327; an opportunity to examine the evidence and to cross-examine witnesses supporting the charges, to offer testimony on one's own behalf, and to be represented by counsel. *In re Oliver, supra; Motes v. United States*, 178 U.S. 458, 467, 471; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U.S. 88, 93.

etc., regarded by the adjudicating body as material in the particular posture of the case, especially in view of the respondent's inactivity for two and one-half years after it became convinced that Mrs. Walker was a Communist. Not until the issuance of the majority opinion of the court below were the petitioners put on notice that such matters were regarded by an adjudicating agency as material. Petitioners have therefore never had a proper opportunity to present evidence in rebuttal of the views concerning Communism presented in the opinion of the court below, and have therefore been deprived of procedural due process of law. *Saunders v. Shaw*, 244 U.S. 317; *Ohio Bell Tel. Co. v. Commission*, 301 U.S. 292, 301-302.

Respondent contended below, and presumably will argue here, that petitioners had two opportunities to present evidence as to the doctrines of the Communist Party. The first such occasion is said to have occurred during the arbitration hearing, when Mrs. Walker declined to answer questions as to her membership in the Communist Party, and was informed by the Board of Arbitration that it would draw "all justifiable inferences" from her refusal to answer. As we pointed out above, there was no occasion for petitioners to present any proofs before the Arbitrators on the issues of Communist Party doctrine or Mrs. Walker's alleged sabotage, etc., propensities, because the Company never pursued those issues with any proof or even interrogation. The issues thus never became material in the arbitration proceeding. In addition, it is strongly doubtful that dedication to sabotage, force and violence is one of the "justifiable

inferences" legitimately to be drawn from a simple refusal to answer questions as to membership in the Communist Party.

The second supposed opportunity to be heard on the doctrines of the Communist Party is said to have occurred in connection with the enforcement proceeding in the Superior Court. There was no such opportunity. The Superior Court's refusal to reopen the record for taking of additional evidence was in accordance with settled California law, which holds that a court has no authority to take additional evidence with respect to matters presented before a Board of Arbitration. *Kerr v. Nelson*, 7 Cal. 2d 85, 89-90.

Finally, even if, contrary to the position argued herein, the Court should conclude that the doctrines of the Communist Party may be the subject of judicial notice, such a conclusion would not be dispositive of the due process question. For there would still remain the issue of Mrs. Walker's personal beliefs and propensities in regard to "sabotage, force, violence and the like". Her discharge cannot be sustained unless that issue is resolved against her, which is impossible on the present record in the light of the constitutional ban against guilt by conclusive presumption without individualized adjudication and proof of *scienter*.

POINT TWO.

THE DECISION BELOW GAVE EFFECT TO FEDERAL AND STATE STATUTES AS LEGISLATIVE ADJUDICATIONS THAT MRS. WALKER IS GUILTY OF MATTERS CONCERNING WHICH SHE HAS HAD NO JUDICIAL TRIAL, AND INFLICTED PUNISHMENT THEREFOR, THUS MAKING OF THOSE STATUTES "BILLS OF ATTAINDER" WITHIN THE MEANING OF ARTICLE I, SECTIONS 9 AND 10, OF THE UNITED STATES CONSTITUTION.

The court below in its opinion attributed to Mrs. Walker guilt as to, or preparation or intent for the commission of, several serious crimes. It stated that "we agree" with the Company's contention that Mrs. Walker's reinstatement to her job would be "illegal" because Mrs. Walker, as "a member of the Communist Party . . . is dedicated to that Party's program of 'sabotage, force, violence, and the like'" (R. 478-479); that her "dedication to and active support of Communist principles and practices stands proved", and that the "true implications of knowing membership in and support of the Communist Party are no longer open to doubt" as to "illegal objectives" (R. 480); that "the type of activity found by the Board here to have been engaged in by Mrs. Walker—i.e., membership 'in the Communist Party with the full implications of dedication to sabotage, force, violence, and the like, which party membership is believed to entail'—constitutes a violation of the California Criminal Syndicalism Act" (R. 483); that she is "a person who would not be entitled to State employment" (R. 485); that she "is known to have dedicated herself to the service of a foreign power and to the practice of sabotage to the end of overthrowing our government" (R. 485); that she, as one of the "adherents" of the Communist Party, is a

"clear and present danger to this country and to its institutions" (R. 486); that it is "conclusively established that a member of the Communist Party cannot be loyal to his private employer as against any directive of his Communist master" (R. 487); that, in the face of the "clear and present danger" of continuing Mrs. Walker in her employment, the Company had "the duty to take such action as it deemed wise to preserve order in its plant and to protect its other employees, both union and non-union, against the same danger, and the possibility of 'sabotage, force, violence, and the like'" (R. 488); that "personal injury or wrongful death" might arise "from the wilful adulteration" of the Company's products "by Mrs. Walker if it continued her in its employ and she should thereafter take that means of Party activity. That acts of sabotage by Communists are reasonably to be expected at any time such acts may be directed by the Party leader is not open to question, . . ." (R. 488); that an employer need not "await a governmental decree before taking steps to protect himself or to exercise his right to discharge employees who upon the established facts are dedicated to be disloyal to him, to be likewise disloyal to the American labor union they may purport to serve, and who constitute a continuing risk to both the employing company and the public depending upon the company's products" (R. 489); that Mrs. Walker's case is "an exemplification" of what Congress had in mind in enacting the Taft-Hartley Act, to wit, that Communists "'had infiltrated union organizations not to support and further trade union objectives . . . but to make them a device by which commerce and industry might be disrupted . . .'"

(citing *Communications Assn. v. Douds*, 339 U.S. 382-389), and that in her union activities "she was but doing the bidding and serving the cause of her foreign master who 'tolerates no deviation and no debate.'" (R. 489-490); and that her reinstatement "would serve no cause save that of the Communist conspiracy", and "would be but aiding toward destruction of the government" (R. 490).

Thus Mrs. Walker is declared to be an actual or conspiring saboteur, Smith Act violator, Criminal Syndicalist, doer of malicious mischief, and general all-around criminal infiltrator, plotter, and national menace. As punishment for these grave offenses, or for her part in the conspiracy to commit them, she is dismissed from her job in one of the ordinary unskilled vocations of life, and is branded as ineligible for any job in a major portion of the nation's private employments, and in all public employments.

However, Mrs. Walker has not had the benefit of a judicial trial on any of these charges. The charges are not based on evidence that she has herself engaged in any of the activities or conspiratorially threatened activities described. The charges result solely from applying to her personally the findings of Congress and the State Legislature with respect to the Communist Party. The only link between these legislative findings and Mrs. Walker is some evidence in the arbitration proceedings purporting to show that she was, or had been, a member of the Communist Party, and the language in the Arbitrators' opinion, previously discussed, that the "honesty" and "accuracy" of *the Company's belief* in such evidence was supported by the fact that the evidence was "undenied"

and "uncontradicted", Mrs. Walker, on advice of counsel, having refused to affirm or deny such membership.

To hold a person guilty of such crimes, utilizing as proof of guilt only the "findings" of Congress in the prologues to legislation such as the Internal Security Act of 1950 and the Communist Control Act of 1954, and similar recitations in State legislation, is to give effect to such legislation as bills of attainder, thereby grossly violating the provisions of Article I, Sections 9 and 10 of the Constitution.

"A bill of attainder is a legislative Act which inflicts punishment without a judicial trial." *Cummings v. Missouri,* 4 Wall. 277, 323. As stated in *United States v. Lovett,* 328 U.S. 303, 315, and repeated in *Garner v. Los Angeles Board,* 341 U.S. 716, 722:

> ". . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

Mrs. Walker has suffered "punishment without the safeguards of a judicial trial", a thing which the Constitution declares "cannot be done either by a State or by the United States". *United States v. Lovett,* 328 U.S. 303, 316-317. That the arbitrary deprivation of one's right to earn a living and to make and benefit from contracts of employment is "punishment" in the constitutional sense cannot be doubted. *Cummings v. Missouri,* 4 Wall. 277, 321-322; *Ex Parte Garland,* 4 Wall. 333, 377; *United States v. Lovett,* 328 U.S. 303, 315-316. See 63 Yale L.J., 844, 849; fn. 26 (1954).

The decision below applies the federal and state statutes to which it refers in such a way as to deprive an alleged member of the Communist Party of the privilege of working as an office clerk, and so as to subject her to serious additional employment disabilities, regardless of her individual fitness to enjoy the privileges so denied to her. Since *Cummings v. Missouri, supra,* it has been clear that the deprivation of privileges constitutes punishment if the grounds for deprivation have no reasonable relation to the fitness of persons to utilize or enjoy the privileges.[26]

No such reasonable relation is present here. The disabilities mentioned are imposed solely because of association, without reference to the fitness of the individual involved to enjoy these privileges if judged on her own merits as an individual, the type of work in which she was engaged, or the question of whether or not she has knowledge of the allegedly evil program of the Communist Party.

The decision below applies the legislation on which it relies in a manner having all the historical earmarks and practical effects of bills of attainder. Attainder statutes are characteristic of periods of savage political intolerance and hysteria. See Story, *Commentaries on the Constitution of the United States* (Fifth Ed., 1891), sec. 1344. They commonly represent a charge made by an angry and vindictive legislature of subverting the government or engaging in acts claimed to be prejudicial to the national

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[26]See *Cummings v. Missouri, supra,* 4 Wall. at 320; *Garner v. Los Angeles Board, supra,* 341 U.S. at 722; *Dent v. West Virginia,* 129 U.S. 114; *Hawker v. New York,* 170 U.S. 189, 198; *United States v. Lovett, supra.*

security. See, e.g., bills attainting the Earl of Stratford, 3 How. St. Tr. 1382; 1518; Earl of Clarendon, 3 How. St. Tr. 318, 392; Bishop of Rochester, 16 How. St. Tr. 323; Archbishop Laud, 4 How. St. Tr. 598, 599. They have historically been resorted to where the evidence is insufficient to prove guilt or where the government is not satisfied with the severity of the punishment which may be imposed under usual judicial proceedings. Woodeson, *Law Lectures* (1792), 653 ff.; Miller, *Lectures on Constitution of the United States* (1893) 584.

There should be no illusion, we respectfully submit, that the threat to constitutional liberties may be ignored because the objects of attainder are Communists, a political group which has been described judicially as "so extremely unpopular with a vastly preponderant majority of the citizenry of our Country as to amount virtually to an anathema in the public mind". (*Commonwealth v. Nelson,* 377 Pa. 58, 104 A. 2d 133, 135 (1954), certiorari granted, October Term 1955, No. 10, and argued this Term). The constitutional prohibition of bills of attainder was adopted for the very purpose of safeguarding unpopular minorities against legislative determination of guilt and infliction of punishment. The colonies resorted to a rash of such bills during the struggle for independence, as a result of the fact that persons who refused to give up their allegiance to the crown were popularly regarded as internal enemies allied with a foreign invader. Thompson, *Anti-Loyalist Legislation During the American Revolution,* 3 Ill. Law Rev. 81 (1908). State legislatures freely characterized all loyalists as persons pursuing "diabolical plans" and "guilty of such atrocious and

unnatural crimes against their country that every friend of mankind ought to forsake and detest them." (Ibid., p. 147.)

> "It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard" (by the bill of attainder clause). *Cummings v. Missouri*, 4 Wall. 277, 322.

Mutatis mutandis, the foregoing would serve today as an accurate description of those forces which, under the influence of the passions generated by the "cold war", would countenance the destruction of our most precious liberties upon the ground of presumed necessity for the defense of our way of life against Communist subversion.

We are aware that the constitutional prohibition of bills of attainder is widely thought to have become in recent years "a waning guaranty". 63 *Yale L. J.* 844 (1954). However, it is submitted that the decisions of this Court in *Communications Assn. v. Douds*, 339 U.S. 382, and *Garner v. Los Angeles Board*, 341 U.S. 716, which are supposed to have narrowed the constitutional protections against bills of attainder, are readily distinguished from the present case. Here there is a conclusive disqualification on the basis of past conduct (the vice which was held not to be present in the *Douds* case). Here also there is not afforded the saving grace of the requirement of *scienter* (the presence of which in the *Garner* case was the ground for the Court's rejecting the argument of attainder).

Likewise, as earlier mentioned, there is lacking here any such reasonable relation between the statutory standard

of disqualification (as applied by the court below) and the fitness of the victim to utilize or enjoy the privileges of which she is deprived. Mrs. Walker's disqualification has been decreed not in the context of any Taft-Hartley oath requirement relating to Communist Party membership such as was held in *Douds* to be constitutionally disqualifying, but it arises in the context of a conclusive presumption that Mrs. Walker is dedicated to sabotage, and other violent crimes. And such a conclusive presumption, by which the requisite reasonable relation between the disqualification and the statutory standard is here sought to be established, is in itself a constitutional nullity, as we showed in Point One. The statutes cited by the court below could not possibly in themselves establish such a reasonable relation in circumstances which, in their very nature, are not susceptible of legislative adjudication, but require an individualized adjudication in a proper judicial trial.

As was said in a recent scholarly review of the present status of the constitutional prohibition against bills of attainder: "If the aim of the prohibition is to allow the imposition of punishment only after a judicial finding of guilt, the legislature cannot be permitted to decide who is guilty of what in the guise of protecting the public. Otherwise, the fate of every citizen will rest not on the rock of constitutional justice but on the shifting sands of legislative pleasure." (*The Constitutional Prohibition Of Bills Of Attainder: A Waning Guaranty of Judicial Trial*, 63 *Yale L. J.*, 844, 859 (1954)).

POINT THREE.

BY CONSTRUING CERTAIN RECENTLY ENACTED STATUTES AS ESTABLISHING A PUBLIC POLICY WHICH DEPRIVES PETITIONERS OF THEIR RIGHT TO ENFORCE A PREVIOUSLY VALID CONTRACT, ENTERED INTO BEFORE THE ENACTMENT OF THOSE STATUTE. AND VALID AND ENFORCEABLE WHEN ENTERED INTO, THE COURT BELOW HAS MADE OF THOSE STATUTES, AS CONSTRUED AND APPLIED, A LAW IMPAIRING THE OBLIGATION OF CONTRACTS, IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION.

The collective bargaining contract involved in this case was entered into on July 23, 1948 (R. 6). Mrs. Walker was an employee at that time, entitled to the rights conferred on employees by the contract. She was discharged on October 6, 1949 (R. 14), and her right to invoke the remedy set out in the contract vested on that date.

The court below does not hold that the contract was invalid and unenforceable when entered into, or that it was invalid or unenforceable on October 6, 1949. It predicates the denial of remedy on a "public policy". But this public policy was not in existence on October 6, 1949, and could not have been, because it is based on the findings recited in state and federal legislation enacted after that date.[27]

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[27]The court does refer to three statutes enacted prior to the date of Mrs. Walker's discharge: the federal Smith Act, Section 1028 of the California Government Code and the state criminal syndicalism law. None of these, however, mentions the Communist Party by name or contains any findings of fact. They could not, therefore, serve as a basis of denying a contractual right to an alleged Communist who had not been convicted or indicted for violating either of them. The court decisions cited by the court below in support of its public policy argument were likewise decided after the contract was made and the employee's right to a remedy had vested.

It appears, therefore, that the contractual remedy available to the Union and to the employee on October 6, 1949, has disappeared because the court below held that subsequent state and federal legislation should be construed to have this effect. The obligation of the antecedent collective bargaining contract was thereby impaired.

It was impaired, moreover, not by the decision of the court, but by the statutory policy which was construed as requiring that decision. In the words of this Court in *Columbia Ry. v. South Carolina*, 261 U.S. 236, 245:

> "... although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of ..."

a constitutional issue under Article I, Section 10, is presented.

> "In such a case [the United States Supreme Court] accepts the meaning put upon the impairing statute by the state court as authoritative, but it is the statute, as enforced by the State through its courts which impairs the contract, not the judgment of the court." *Tidal Oil Co. v. Flunagan*, 263 U.S. 444, 453.

Nor is the impairing effect of the statutes avoided because some of them are federal rather than State laws. The provision that "No State shall pass any law impairing the Obligation of Contracts" means also that a State cannot "accomplish the same end by granting any permission necessary to enable Congress to do so". *Ashton v. Cameron County Dist.*, 298 U.S. 513, 531.

> "The constitutional provision prohibiting a State from *passing* a law impairing the obligation of contracts, equally prohibits a State from *enforcing* as a law an enactment of that character, from whatever source originating." (Italics by the Court.) *Williams v. Bruffy*, 96 U.S. 176, 184.

Compare also *Gunn v. Barry*, 15 Wall. 610, 623 (congressional approval of a state constitution cannot sanction provisions having contract-impairment effects).

Nor, it would seem, is this Court precluded from determining the question of statutory impairment merely because the State court structured its decision in terms of the asserted illegality of the contract on grounds of public policy. When the jurisdiction of this Court is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, it is the duty of the Court to exercise independent judgment as to the nature of the contract (*Board of Liquidation &c. v. Louisiana*, 179 U.S. 622), and as to its validity (*Seton Hall College v. South Orange*, 242 U.S. 100; *Atlantic Coast Line v. Goldsboro*, 232 U.S. 548; *Houston & Texas Central Rd. Co. v. Texas*, 177 U.S. 66).

There would appear to be no escape from the conclusion that the retroactive application of statute in this case, by depriving the Union and the employee of a remedy which had vested previously, impaired the obligation of a valid collective bargaining contract.

POINT FOUR.

THE DECISION BELOW VIOLATES THE SUPREMACY CLAUSE OF ARTICLE VI, CLAUSE 2, OF THE UNITED STATES CONSTITUTION BECAUSE CONGRESS HAS PRE-EMPTED AND FULLY OCCUPIED THE FIELD OF LEGISLATION AS TO EMPLOYMENT RIGHTS OF COMMUNISTS; AND WHERE, AS HERE, THE FIELD IS ONE OF DOMINANT FEDERAL INTEREST AND RESPONSIBILITY, AND THERE IS NO TRADITIONAL STATE POWER TO ACT, LEGISLATION BY CONGRESS MUST BE DEEMED TO SUPERSEDE STATE LAW OR POLICY ON THE SAME SUBJECT, AS CONGRESS HAS NOT AFFIRMATIVELY ASSENTED TO SHARE ITS POWER.

The decision below poses serious questions as to the relationship between State and Nation in the delicate sphere of internal security, with overtones involving foreign policy. The decision denies the right of Communists to employment in every branch of industry which may in some way be thought to affect national defense. To "provide for the common Defence . . . of the United States" is, however, one of the powers expressly granted to Congress by the Constitution (Article I, Section 8), and Congress has already enacted a comprehensive scheme dealing with the employment of Communists in defense industries. We refer to the Internal Security Act of 1950 (50 U.S.C. Sec. 781, et seq). Congress in that Act rejected the blanket exclusion of Communists from defense employment. As the dissenting Justices below pointed out, Congress did not "prohibit all hiring of Communists nor did it leave to the courts the decision as to what jobs Communists might hold. It provided instead that the Secretary of Defense should determine and designate the defense facilities in which members of Communist-action organizations should not be employed."[28] Thus the court

[28]As the Act is not yet operative, no "defense facilities" have yet been designated. However, as shown earlier, the federal gov-

suggest that the problem is not merely a national one; in many of its aspects it is international, and its connection with the field of foreign relations is close. As this Court declared in *Hines v. Davidowitz*, 312 U.S. 52, at 63 (quoting from the *Chinese Exclusion Case*, 130 U.S. 581, 606):

> "'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.'"

In this context any suggestion that the State of California, in dealing with the employment rights of Communists in private industry would merely be acting under a traditional exercise of police power is meaningless. And there is here no need to discuss the power of the State to act in this field in the absence of federal legislation since Congress has acted.

Further, whatever should be the decision of this Court in the pending *Steve Nelson* case, *supra*, the authorities and reasons applicable to the instant case would independently require disapproval of the decision below on the ground of federal supremacy.

In the *Steve Nelson* case the government in its *amicus curiae* brief (pp. 37-42), seeking to distinguish *Hines v. Davidowitz*, *supra*, suggests that different considerations apply in the case of a *State criminal* statute, such as the Pennsylvania sedition law, and a State attempt to enact a system of *regulation* in a field already occupied by the federal government. The Solicitor General in *Nelson* argues that the former would not result in a federal-State jurisdictional conflict, while the latter would. Without

agreeing that the suggested distinction is necessarily sound, we nevertheless point out that the instant case involves precisely the kind of conflicting State and federal regulatory systems that the Solicitor General asserts to be condemned by the supremacy clause of the Constitution. Nor is the evil limited to State intervention in a field in which Congress in the Internal Security Act has already acted, namely, the employability of Communists in industries affecting the national defense. The vice of the decision below is compounded by the breadth, indefiniteness, and general unworkability of a scheme of security screening dependent on the case-by-case application by the courts of an imprecise public policy standard. As the dissenting Justices declared below:

> "By sanctioning these violations of Cutter's contract this court . . . needlessly introduces confusion into a field in which Congress has already undertaken to formulate a workable policy. (50 U.S.C.A. § 781 et seq.)
>
> "It is true that there are sensitive areas in which no Communist should be employed. We cannot assume, however, that the security system established by the federal government is not adequate to protect these areas from subversive persons. As the very authorities cited in the majority opinion make clear, neither Congress in enacting subversive control legislation nor the executive department in enforcing it has been insensitive to the nation's security." (R. 495)

Clearly, the decision below trenches upon the national province in a regulatory field where the federal government is supreme. The decision should therefore be reversed.

POINT FIVE.

THE DECISION BELOW CONFLICTS WITH THE POLICY AND PROVISIONS OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947.

Federal supremacy is undermined by the decision below in yet another field, that of labor relations. Congress in the Labor-Management Relations Act of 1947, 29 U.S.C. 141 et seq., adopted a comprehensive system for the regulation of labor relations in all industries affecting commerce.[30] Central to that system is Section 7 (29 U.S.C. 157), which was taken over from the Wagner Act and reenacted in the Taft-Hartley Act without change material in the present context. That section contains a federally guaranteed right to self-organization and to bargain collectively through freely chosen representatives. Implementing Section 7 are the provisions of Section 8(a)(1) and (3) (29 U.S.C. 158(a)(1) and (3)), the latter subsection barring discrimination because of union membership or activities.

That State action, whether legislative or judicial, may not stand if it is in conflict with the federal labor policy, is well settled by a series of decisions by this Court. Those decisions are reviewed and concisely summarized in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 474-476[31].

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[30]Cutter Laboratories concededly is an enterprise "affecting commerce" within the meaning of the Act. The National Labor Relations Board has exercised jurisdiction over the company's labor relations in the past and is currently engaged in adjudicating a representation case involving the employees at the Berkeley plant (Cas. No. 20—RC 2981).

[31]See, especially, *Hill v. Florida*, 325 U.S. 538; *International Union v. O'Brien*, 339 U.S. 454; *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383; *Garner v. Teamsters Union*, 346 U.S. 485.

The governing principle is thus stated in *Weber* at page 474:

> "The Court has ruled that a State may not prohibit the exercise of rights which the federal Acts protect."

Where the State and federal regulatory systems cannot "move freely within the orbits of their respective purposes without infringing upon one another", the national law must prevail. *Hill v. Florida*, 325 U.S. 538, 543.

That the decision below is in irreconcilable conflict with the cited provisions of the Labor-Management Relations Act, that it does "prohibit the exercise of rights which the federal Acts protect" (*Weber v. Anheuser-Busch, supra*), seems to us beyond debate. The court below announces a principle that the discriminatory discharge of the leader of a union, a discharge found to have been deliberately timed to take effect at the moment when it could most weaken the union, is justified if the immediate victim happens to be a Communist. The fact that the *union* is the ultimate victim of the employer's discriminatory action is given no weight by the court, which treats the issue as if it were merely a matter between the discharged employee and the employer. Section 8(a)(3) of the Labor-Management Relations Act is thus set at naught.

The decided cases indicate that it is not unusual for an employer to attempt to justify a discharge on grounds which, if they were the true reason for the discharge, would be beyond challenge under the Wagner or Taft-Hartley Acts. Where, however, the real reason for the discharge is union activities, the Act is nevertheless violated. Thus, in *N.L.R.B. v. L. Ronney and Sons*, 206 F.

2d 730 (C.A. 9, 1953), cert. den., 346 U.S. 730, reh. den. 347 U.S. 914, the ostensible ground for the employer's action was the inefficiency of the employees. The Board found that, conceding the employees were inefficient, the real ground for discharge was union activities. On petition for enforcement, the Court of Appeals held:

> ". . . It is well settled that an employer violates §8(a)(3) by discharging or refusing to reinstate an inefficient employee if the employer's reason for so doing is not the employee's inefficiency but his union affiliation or activity (citations). The critical question is the employer's *true motive*. As the court said in the Electric City case, *supra*, 178 F. 2d at page 983, '. . . it matters not that for reason apart from union activity an employee deserves summary discharge if as a fact the reason was union activity' ".[32]

No logical reason can be perceived for refusing to apply the foregoing principle to cases where the ostensible reason for discharge is Communism. Congress did not say, in the Taft-Hartley Act, that it is illegal to discharge for union activities *except* where the employee in question is a Communist. Nor have the federal courts construed the

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[32] Accord: *National Labor Relations Board v. Beaver Meadow Creamery*, 215 F. 2d 247, 251 (C.A. 3, 1952); *National Labor Relations Board v. Coal Creek Coal Co.*, 204 F. 2d 579, 583 (C.A. 10, 1953); *National Labor Relations Board v. Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2, 1954); *National Labor Relations Board v. Whitin Machine Works*, 204 F. 2d 883, 885 (C.A. 1, 1953); *National Labor Relations Board v. Columbia Products Corp.*, 141 F. 2d 687, 688 (C.C.A. 2, 1944); *Wells v. National Labor Relations Board*, 162 F. 2d 457, 459, 460 (C.C.A. 9, 1947). The pertinent cases and principles are further discussed at pages 4-7 of the "Brief Amicus Curiae of Congress of Industrial Organizations and of the CIO-California Industrial Union Council in Support of Petition for a Writ of Certiorari", filed herein, to which the Court is respectfully referred.

Act as not extending to Communists protection against discriminatory discharge.

In *N.L.R.B. v. Pratt, Read & Co.*, 191 F. 2d 1006 (C.A. 2, 1951), the employees adhered to a CIO union which had not filed the non-Communist affidavits required under the Taft-Hartley Act. They were discharged, the company claiming it was because of their incapacity or inadequacy as employees. The Board ordered reinstatement and the matter was presented for enforcement to the Court of Appeals. Headnote 3 (191 F. 2d at 1007), which is borne out by the body of the case, states:

> "Employees' adherence to a union which had not filed non-communist affidavits was insufficient ground for their discharge, and discharge for such reason was a violation of rights of employees under National Labor Relations Act, and employees were entitled to reinstatement with back pay. . . ."

N.L.R.B. v. Fulton Bag and Cotton Mills, 180 F. 2d 68 (C.A. 10, 1950), involved this situation:

The company contended that the unfair labor practice charge which had been filed on behalf of a discharged employee had not been filed in good faith or in the interest of the employee but to "effectuate the objectives and designs of the Communist Party." Prior to the hearing the company had asked for subpoenas to prove that the person who had filed the unfair labor practice charge and the employee were members of the Communist Party. The subpoenas were refused. At the hearing the company made an offer of proof to the same effect. The offer of proof was refused. On the petition for enforcement the court held (180 F. 2d at 71):

"Even though Levin may have been a member of the Communist Party, and even though his purpose in lodging the charge with the Board was to further the objects and designs of the Communist Party those facts did not affect the jurisdiction of the Board. The Act requires a charge before the Board may issue a complaint . . . And when the Board issues its complaint, the sole question is the truth of the accusation of unfair labor practices contained in it."[33]

The failure of Congress to exclude Communists from the protection of the discriminatory discharge provisions of the Taft-Hartley Act cannot be regarded as inadvertent. When Congress intended disabilities because of Communist Party membership, it knew how to say so. (29 U.S.C. 159(h); *Communications Assn. v. Douds*, 339 U.S. 382). The decision below grafts an amendment onto the Act which is contrary to its terms and to authoritative judicial interpretation. It "prohibit(s) the exercise of rights which the federal Acts protect." (*Weber v. Anheuser-Busch, Inc., supra,* at 474.) It cannot therefore be permitted to remain unreversed.

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[33]The case also involved the situation that the employee had lied as to his reasons for wanting to be off work. As to this the court held the company was not warranted in laying the employee off and refusing to reinstate him "if the actual reason for the layoff and refusal to reinstate was his membership and activities in the union and his participation in the proceedings pending before the Board." *(Ibid.)*

CONCLUSION.

The decision below should be reversed.

Dated, March 20, 1956.

Respectfully submitted,

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(Appendix Follows.)

Appendix

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

ARTICLE I

Section 9

No Bill of Attainder or ex post facto Law shall be passed.

Section 10

No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.

ARTICLE VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

FEDERAL STATUTES.

Internal Security Act of 1950

50 U.S.C. Sec. 781

As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

(1) There exists a world Communist movement which in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the demand of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

• • • • • • • •

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is

vested the direction and control of the world Communist movement.

* * * * * * *

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

50 U.S.C. Sec. 784(a)

When a Communist organization, as defined in paragraph (5) of section 782 of this title, is registered or there

is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

• • • • • • •

(C) In seeking, accepting or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility.

• • • • • • •

50 U.S.C. Sec. 784(b)

The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post conspicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

Communist Control Act of 1954

50 U.S.C. Sec. 841

Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limita-

tion as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Labor Management Relations Act, 1947

29 U.S.C. Sec. 151

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. Sec. 157

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

29 U.S.C. Sec. 158(a)

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization. . . .

STATE STATUTES

California Government Code, Sec. 1027.5
(Stats. 1953, ch. 1646, Sec. 1)

The Legislature of the State of California finds that:

"(a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law . . .

"(d) Within the boundaries of the State of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. These communist organizations are characterized by identification of their programs, policies, and objectives with those of the world communism movement, and they regularly and consistently cooperate with the endeavor to carry into execution programs, policies and objectives substantially identical to programs, policies, and objectives of such world communism movement. . . .

"There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict,

interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California . . .''

California Government Code, Sec. 1028
(Stats. 1947, ch. 1418, Sec. 1)

It shall be sufficient cause for the dismissal of any public employees including teachers in the public schools or any state supported educational institution when such public employee or teacher advocates or is a member of an organization which advocates overthrow of the Government of the United States or of the State, by force, violence, or other unlawful means.

California Penal Code, Sec. 11400
(Stats. 1919, ch. 188; codified 1953)

''Criminal syndicalism'' as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

California Penal Code, Sec. 11401
(Ibid.)

Any person who:

(1) By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime,

sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

(2) Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism of the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

(3) Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

(4) Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid in and abet criminal syndicalism; or

(5) Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years.